IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK and JACK H. QUARITIUS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, Honorable William M. Taylor, Judge Presiding in Cause No. 3-74-1231-C entitled "Lawrence F. Lee, Jr., et al. v. Navarro Savings Association" is found at 416 F.Supp.

1186 (N.D. Tex. 1976).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550, likewise entitled, is reported at 597 F.2d 421 (5th Cir. 1979).

As required by Supreme Court Rule 23(i), true and correct copies of the opinions of the Courts below are appended hereto.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this cause as shown by the following:

1. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and was entered of record on June 18, 1979.

2. The Suggestion for Rehearing En Banc filed by Petitioners (Appellees in the Court below) was denied August 1, 1979. By order entered August 15, 1979, the United States Court of Appeals for the Fifth Circuit stayed the issuance of its mandate pending Petition for Writ of Certiorari to this Court through and including September 16, 1979; and subsequent order extended to September 21, 1979.

3. The Supreme Court of the United States has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

ISSUE PRESENTED FOR REVIEW

Whether for purposes of the diversity jurisdiction of the District Courts of the United States, the citizenship

of a real estate investment trust should be determined with reference to the citizenship of its trustees rather than that of its beneficial shareholders by application of "real party in interest" rules or for any other reason.

STATUTORY PROVISIONS CONSTRUED

This case involves construction of the provisions of 28 U.S.C. §1332(a) which provides as follows:

> §1332. Diversity of citizenship; amount in controversy; costs.
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States:
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT OF THE FACTS

This case was originally brought in the State District Court of Texas, 116th Judicial District sitting at Dallas County, Texas in March, 1974 by Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W.

York and Jack H. Quaritius, each of whom are Trustees of Fidelity Mortgage Investors, a real estate investment trust, with its principal offices at Jacksonville, Florida, against the Petitioner, Navarro Savings Association, as Defendant.[1] The substantive cause of action was for Navarro's alleged fraud and breach of contract in the issuance and dishonor of a loan commitment letter by Navarro, a corporate citizen of Corsicana, Navarro County, Texas.

Following evidentiary proceedings and the resulting transfer of the case to the State District Court at Navarro County, Texas, the Trustees dismissed the State action and refiled in the United States District Court for the Northern District of Texas. The Plaintiff-Trustees brought the action in their capacity as Trustees only and asserted the existence of federal diversity jurisdiction.

Upon Navarro's motion, the question of lack of complete diversity was raised; and the District Court thereupon granted leave to the Trustees to amend their complaint. Although the Amended Complaint alleged three additional grounds of jurisdiction as alternatives to diversity, the District Court dismissed the Amended Complaint, concluding that the Trustees had failed to sustain their burden of establishing jurisdiction. Specifically, by his memorandum opinion and order, the Court below determined that diversity jurisdiction did not exist in that the residence of the shareholders of FMI—as opposed to that of the Trustees only—was controlling. The District Court further determined that the Trustees had failed to establish any of the other

[1] For clarity, reference to the Petitioner will be made by the name of "Navarro" and reference to the Respondents will be by the name of "Trustees." Reference to Fidelity Mortgage Investors as an entity will be as "FMI."

alleged bases for Federal jurisdiction.[2]

On appeal to the United States Court of Appeals for the Fifth Circuit, the Trustees emphasized, as they did in the District Court, the question of diversity jurisdiction. The Court of Appeals reversed, by a 2-1 majority, holding that the Trustees were "the real parties in interest" and, their citizenship being completely diverse to that of Navarro, jurisdiction under 28 U.S.C. §1332(a) was proper. In its opinion, the panel majority focused only on the diversity jurisdiction issue and, concluding that the District Court had erred in dismissing the case, did not reach the remaining grounds for Federal jurisdiction.

In a dissenting opinion, Judge Vance concluded that "a party cannot unilaterally confer subject matter jurisdiction on a Federal Court by declaring who is to represent the trust in legal actions."

It is respectfully submitted that the opinion of the majority of the Court of Appeals in this cause is in direct conflict with the opinion of the Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 16 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935). This is a case of first impression in this Court and clearly

[2] The other grounds alleged were the Securities Act of 1934; class action under Rule 23.2 of the Federal Rules of Civil Procedure; and Federal Bankruptcy Act jurisdiction, FMI having become a debtor-in-possession subsequent to the filing of the Original Complaint. The District Judge determined that the claim under the 1934 Act was frivolous; that the class action procedure was unavailable; and that Navarro had not consented to Bankruptcy Act jurisdiction.

overrules the decisions of the district courts of several circuits in *Larwin Mortgage Investors v. River Drive Mall, Inc.*, 392 F.Supp. 97 (S.D. Tex. 1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F.Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F.Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F.Supp. 120 (D. Ore. 1978); *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D. Pa. 1978).

So far as is known to counsel for Navarro, the only decision of any other Circuit concerning this issue is *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978) wherein the Court denied diversity jurisdiction. Accordingly, the decision of the Court of Appeals in the instant case is contrary to all prior cases in which the issue of citizenship of an unincorporated business association has been presented. Most importantly, it is respectfully suggested that the opinion of the appeals Court majority in this cause is, as observed by its dissent, an extension of diversity jurisdiction to a category of litigants not previously contemplated by Congress.

For the reasons stated, it is respectfully suggested that this cause merits consideration by the Supreme Court of the United States and that upon due consideration, the decision of the majority of the Court of Appeals in Cause No. 76-3550 should be reversed.

ARGUMENT AND AUTHORITIES

ISSUE: WHETHER THE CITIZENSHIP OF AN UNINCORPORATED BUSINESS ASSOCIATION–A "REAL ESTATE INVESTMENT TRUST"–FOR THE PURPOSES OF THE DIVERSITY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES, IS THAT OF EACH OF ITS SHAREHOLDERS.

SUMMARY OF THE ARGUMENT

The District Court properly concluded that it lacked diversity jurisdiction because the citizenship of FMI was not, as Trustees contended, determined by either the place of business of FMI or the residence of the Trustees selected as Plaintiffs. Rather, as an unincorporated business association or "Massachusetts Business Trust," the citizenship of FMI must be determined by the residence of each of its shareholder beneficiaries.

FMI, as a "business trust" has as its object the conduct of business and sharing of the profits as distinguished from the traditional express trust the object of which is to hold and conserve particular property with incidental powers of management conferred upon its Trustees. FMI's counsel stipulated in the District Court that at all material times some of its beneficial interest owners were residents of Texas. Accordingly, FMI lacks the requirement of complete diversity required by 28 U.S.C. §1332(a).

The Court of Appeals majority, in analyzing the organic composition of FMI in the context of diversity jurisdction analogized to the "real parties in interest." This analysis incorrectly focused upon those provisions

of the trust instrument governing the relationship between the shareholders and the Trustees. The emphasis upon the Trustees' extensive control over the day to day management of the REIT s assets is misplaced. Analysis of the degree of control vested in the Trustees is relevant for determining whether personal liability may be imposed upon the shareholders of the Trust. The similarities between the "business trust" and the corporate form of enterprise, i.e., transferability of interests, continuity of business activities, delegated management, etc., more than outweigh the similarities between this business form and the conventional trust.

POINTS OF ARGUMENT

A real estate investment trust is an unincorporated business association rather than an express trust; accordingly, the residence of each of its shareholder beneficiaries is determinative upon the issue of citizenship for diversity purposes pursuant to 28 U.S.C. §1332(a).

Fidelity Mortgage Investors ("FMI") is by its own admission a profit-oriented "business trust," the principal occupation of which is the investment of the trust capital in mortgage loans on real property. According to the declaration of trust which created FMI, apparently much of the day-to-day business of the trust is managed by its Board of Trustees, while the shareholder beneficiaries have the authority to elect and remove trustees and to approve any sale or other disposition of assets comprising 50% or more of the trust estate. Admittedly, FMI has many of the attributes of an incorporated

entity such as a centralized management, transferability of shares, continuity of business, etc. Were FMI a corporation or an entity which should be treated as a corporation, and considering its principal place of business to be without the State of Texas, it is clear that diversity of citizenship would exist with the Texas Defendant, Navarro Savings Association.[3] However, both here and in the Courts below the Trustees have disclaimed any theory of corporate enterprise choosing instead to rely on the theory that the Trustees, through their inherent powers under the declaration of trust, are the "true parties in interest" as such term is defined in Rule 17 of the Federal Rules of Civil Procedure.[4]

Relying upon the case of *Larwin Mortgage Investments v. Riverdrive Mall, Inc.*, 392 F. Supp. 97 (S.D.Tex. 1975) and other cases which are discussed infra, the District Court concluded that the citizenship of FMI was properly determined with reference to the residence of each of its shareholder beneficiaries. In that the Trustees failed to sustain their burden to plead and prove[5] the absence of any Texas shareholders in FMI, (and, in fact, stipulated their existence) the presence of whom would destroy the complete diversity requirement of 28 U.S.C. §1332(a), diversity jurisdiction was lacking.[6]

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[3] 12 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 836 (1975).

[4] Memorandum Opinion and Order of Judge Taylor at footnote 1; Appellants' Brief in the Court of Appeals at page 5.

[5] Ray v. Bird and Son, 519 F.2d 1081 (5th Cir. 1975).

[6] Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267 (1806); Shainwald v. Lewis, 108 U.S. 158, 2 S.Ct. 385, 27 L.Ed. 691 (1883); Mas v. Perry, 489 F.2d 1396, reh.den. 492 F.2d 1242 (5th Cir. 1974), cert.den. 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70.

In *Larwin*, Judge Cox considered the precise issues presented in this case. Larwin Mortgage Investments was a California real estate investment trust which advanced funds for interim financing of a construction project in Laredo, Texas. The shares of beneficial interest were publicly held by several thousand shareholders and traded on the New York Stock Exchange. The declaration of trust establishing Larwin provided that:

> "While legal title to the trust assets rests exclusively in the trustees, the shareholders (holders of beneficial interest) are empowered to remove trustees, with or without cause, and fill trustee vacancies. Additionally, shareholders' consent must be obtained before the consummation of any transaction which involves the disposition of more than 50% of the trust estate." [Footnotes omitted] 392 F.Supp. at 100.

The Court considered Larwin's two contentions: (i) that it was a juridical entity in and of itself, whose citizenship was California; and (ii) alternatively, that as an active trust, only the residence of its trustees should be considered for diversity purposes. 392 F.Supp. at 98.

Judge Cox determined that the decision of the United States Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) effectively foreclosed judicial recognition of unincorporated associations as juridical entities for diversity purposes.[7] The Court then determined that the characteristics of Larwin as a business organization—particularly the rights of the beneficial interest holders to approve certain transactions and to elect or remove the manager-trustees—predominated over its owtward appearance as a conventional trust. The Court analogized to the question before the United States Supreme Court in *Morrissey v. Commissioner*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) where it was observed that:

> "The object [of the business trust] is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of business and sharing its gains." 296 U.S. at 357, 56 S.Ct. at 295.

Concluding that it is the responsibility of Congress to change the citizenship status of such trusts for diversity purposes, Judge Cox dismissed Larwin's alternative contention.

In *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D.Pa. 1978) Judge Luongo reviewed all the relevant authorities and concluded that the reasoning applied in *Larwin, supra*, was appropriate. In *Fidelco*, the REIT was the defendant in a diversity-based suit and was, in fact, the party alleging the lack of jurisdiction. Recognizing "the significant difference between the business trust and the conventional trust-differences both in purpose and structure . . ." the court concluded that the REIT could not be treated as a conventional trust and must therefore be treated as an unincorporated association. 446 F.Supp. at 128.

In *Fidelco*, the plaintiffs emphasized the degree of control exercised by the trustees over the business and assets of the REIT. The Court observed:

[7] See also Baer v. United Services Automobile Association, 503 F.2d 393 (2nd Cir. 1974); Fox v. Prudent Resources Trust, 382 F.Supp. 81 (E.D.Pa. 1974); Lowry v. International Brotherhood of Boilermakers, 259 F.2d 568 (5th Cir. 1958); 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 848 (1975).

"This,[plaintiffs] contend, makes Fidelco a conventional trust, rather than an unincorporated association such as a partnership. I cannot agree. True, under the general rule, the degree of control vested in the trustees largely determines whether an entity will be treated as trust or partnership *when personal liability is sought to be imposed on the shareholders.* See, e.g. *Hecht v. Malley, supra,* 265 U.S. at 147, 44 S.Ct. 462 (discussing Mass. decisions); 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations,* §8230 at 554-55, 8261 (1962 & Supp. 1977). The issue in this case is entirely different. It is whether a business trust sufficiently resembles a conventional trust to be accorded like treatment in the determination of its citizenship for diversity purposes. Thus, as was the case with Fidelco's REIT status, the control vested in the trustees does not, without more, require that Fidelco be treated as a trust. Nor does Fidelco's REIT status, when taken together with the trustee's extensive control over its affairs, require that Fidelco be viewed as a trust. Both characteristics evidence some similarities between Fidelco and the conventional trust, but in my view, this similarity is largely offset by the several dissimilarities referred to earlier." 446 F.Supp. at 129.

That *Larwin* and *Fidelco* deal squarely with the issue presented here cannot be denied. That every other reported decision has followed the rationale of *Larwin* is likewise indisputable. See, e.g. *Riverside Memorial Mausoleum v. UMET Trust,* 581 F.2d 62 (3rd Cir. 1978); *Jim Walter Investors v. Empire-Madison, Inc.,* 401 F.Supp. 425 (N.D.Ga. 1975); *Chase Manhattan Mortgage and Realty Trust v. Pendley,* 405 F.Supp. 593 (N.D.Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors,* 415 F.Supp. 351

(N.D.Tex. 1976); *Carey v. U.S. Industries, Inc.,* 414 F.Supp. 794 (N.D.Ill. 1976); *Heck v. A.P. Ross Enterprises, Inc.,* 414 F.Supp. 971 (N.D.Ill. 1976); *Independence Mortgage Trust v. White,* 446 F.Supp. 120 (D.Ore. 1978).

In each of those cases the same arguments advanced here were rejected with the observations that "Pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the Court," *Bouligny, supra* 382 U.S. 145, 150-151, 86 S.Ct. 272, 275; and that "to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants." *Chase Manhattan, supra,* 405 F.Supp. 593, 595.

The theory that the Trustees are the real parties in interest as that term is defined in Rule 17(a) F.R.Civ.P. is incorrect. In the *Chase Manhattan* case, supra, the Court rejected this argument for two reasons: First, that each of the prior decisions to the effect that citizenship of the shareholders is controlling implicity presumes that they are the real parties in interest; and second, the substantive State law granting the trustees capacity to sue in their own names does not bestow diversity jurisdiction. Each of the District Court decisions cited above are in accord with this construction.

Under the holding of the panel majority in this case, the beneficial interest holders of a real estate investment trust may create or destroy diversity jurisdiction through the simple device of removal or appointment of a trustee having a residence which, when compared to the opposing party, suits the REIT's purpose. Navarro urges that this goes beyond the intent of Congress and conflicts with the *Bouligny* case, *supra.*

The opinion of the Court of Appeals majority in this case holds that Rule 17(a) is correctly applied in the facts of this case. However, it is respectfully submitted that Rule 17(a) does not comprehend the "business trust" as distinguished from the conventional trust. In holding, in effect, that under Rule 17(a) the declaration of trust governing the association of shareholders in a Massachusetts-type business trust controls, the majority relegates the determination of Federal jurisdiction to such shareholders and presumably, would permit them to create or destroy diversity as from time to time may suit their purposes. In this case, while the Trustees admittedly have a great deal of control over the day-to-day management of the business of FMI, it is still the case that the beneficial interest holders ultimately have the power of removal of the Trustees by simple majority vote.

It will be recalled that in *Independence Mortgage Trust v. White, supra,* the business trust was attempting to *defeat* diversity jurisdiction. It is not difficult to imagine the situation where a business trust such as FMI might, in a case of sufficient importance, remove one or more trustees and substitute others so as to create or destroy diversity jurisdiction as suits the immediate purpose.

In this case, the record is not clear as to whether all trustees of FMI were joined as Plaintiffs since, on the Amended Complaint, some of the names which originally appeared have been dropped. Whether there are trustees of FMI who are citizens of the State of Texas and wether the Trustees are themselves beneficial interest holders in the association does not appear from the record. However, the potential for abuse is apparent. Thus, resort to the trust instrument to determine the real parties in interest is of questionable value because

of the transitory nature of the results and the potential for abuse.

The opinion of the Court of Appeals in the instant case further holds that the case of *Morrissey v. Commissioner of Internal Revenue,* 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) is inapposite. In that case, the business trust was held to be an unincorporated association for the purpose of taxation. It is respectfully suggested that the panel majority errs in so holding. The characterization of the REIT for tax purposes, while not necessarily controlling, is instructive for determining its status for other related purposes including Federal Court jurisdiction.

A fair reading of *Larwin* clearly militates against the conclusion that Judge Cox considered the tax treatment of REIT's as determinative. The Court observed: "The problem of whether Larwin should be treated, for diversity purposes, as a trust or as an unincorporated association, *appears analogous* to that before the Supreme Court in *Morrissey* . . ." 392 F.Supp. at 100 (emphasis added); and further stated:

> "The advantageous treatment of such publicly-held trusts under certain provisions of the Internal Revenue Code of the United States does not require the courts to treat any such trusts as a traditional trust." 392 F.Supp. at 101.

In each of the other cited cases, it is clear that the respective courts were applying the *Morrissey* reasoning by analogy only.[8] As Judge Taylor observed in *Lincoln*

[8]Lincoln Associates v. Great American Mortgage Investors, supra, 415 F.Supp. at 354-55; Jim Walter Investors v. Empire-Madison, Inc., supra, 401 F.Supp. at 429. Apparently, in the other cited cases, the taxation aspect of REIT's was of even less weight or not a factor at all in the ultimate decision.

Associates, supra, and reiterated in his opinion in this case.

> "The issue before the Court turns not upon an election by [the REIT] under the tax code which results in its being a 'real estate trust' rather than a 'real estate investment trust,' but rather upon the intrinsic nature and purpose of [the REIT] as a business enterprise." 415 F.Supp. at 354

Indeed, analysis of the Supreme Court's opinion in *Morrissey*, indicates it is not mere semantics to state that this Court was concerned not with the question of the tax treatment of the trust in question, but rather whether such trust, as a business enterprise, was sufficiently distinct from a traditional "trust" as to render it an "association" for any purpose including incidentally, taxation. *Morrissey, supra,* 296 U.S. at 356-60, 56 S.Ct. at 295-96; *Fidelco, supra,* 446 F.Supp. at 127, n.3.

From the foregoing analysis of the relevant cases two important facts are clear: (i) that *Morrissey* dictates that a "business trust" organized for the purpose of conducting an on-going business, dynamic in its interests, ownership and trustee-management, is an unincorporated business association regardless of its characterization as a "trust" and (ii) that *Bouligny* requires that for diversity purposes an unincorporated association—once it is properly so characterized—has as its citizenship the residence of each of its constituent members or interest holders. Applying the Supreme Court decisions to REIT's, each of the District Courts have properly concluded that the large, publicly traded REIT's lack the requirement of complete diversity where there are shareholders residing in the same state as the opposing party.

Faced with the obvious direct precedental effect of the *Bouligny-Morrissey* analysis as applied in *Larwin,* etc. the Trustees in their brief before the Court of Appeals argued that (i) the *Larwin* group of cases are factually distinguishable and (ii) if not distinguishable, the cases are wrong in failing to apply a "traditional analysis" to determine the real parties in interest. The opinion of the majority appears to have rejected the contention that the *Larwin* cases are distinguishable.

The second argument, that "traditional analysis" should be applied in this case, is based upon several cases of less than recent vintage, the precedental value of which is questionable when applied to the facts of this case. Thus, in each of *Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford,* 78 U.S. (11 Wall.) 172, 20 L.Ed. 1979 (1870); *Dodge v. Tulleys,* 144 U.S. 451, 12 S.Ct. 728, 36 L.Ed. 501 (1892); and *Bullard v. City of Cisco,* 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254 (1933), the Supreme Court was concerned with express trusts created for the purpose of securing payment of mortgages on real property or as in *Cisco,* coupon bonds issued by a municipality. In no instance was the trusteeship created for the purpose of operating an on-going business with the attendant features of transferrable shares, continuity of interest, purchase, replacement and sale of assets, sharing of profits, etc. While in each case, the trustees involved were invested with varying degrees of authority, their powers were always tied ultimately to some specific res or indenture transaction. As the Court determined in *Morrissey, supra,* the superficial indicia common to both entities, such as vesting the trustee with legal title to the assets, is not controlling. Rather it is the purpose

for which the trusteeship is created which controls.[9] *Fidelco, supra,* 446 F.Supp. at 127, n.3.

The opinion of the Court of Appeals quotes at some length the provisions of the promissory note from Rockwall Estates, Inc. payable to the individual trustees and the commitment letter allegedly issued by Navarro to Rockwall Estates, Inc. Navarro, of course, is not alleged to be a party to the promissory note transaction and in any event, Navarro believes that the terms of a contractual instrument between a third party and the Trustees could not serve to confer diversity jurisdiction on the Federal Court. More importantly, neither the promissory note nor the commitment letter are material in determining the status of FMI for diversity purposes.

The provisions of the Declaration of Trust referred to in the opinion of the Court of Appeals should not be considered the determinative factor of FMI's status for federal jurisdictional purposes. In the dissenting opinion, Judge Vance cites the opinion of Judge James C. Hill, then a District Judge, in the case of *Chase Manhattan Mortgage & Realty Trust v. Pendley,* 405

[9]The cases of Curb and Gutter Dist. No. 37 v. Parrish, 110 F.2d 902 (8th Cir. 1940); and Allen-West Commission Co. v. Brashear (Cir.Ct. E.D.Ark. 1910), cited by the Trustees involved similar facts. *Parrish* involved the trustee in a municipal bond situation; *Allen-West* involved a real estate deed of trust. The precedental value of Dodge v. Tulleys, supra, and Houston Oil Company v. Village Mills Co., 241 S.W.122 (Tex.Comm.App. 1922, holding approved) are further diminished by the fact that in those cases, the representative parties were also the true parties in interest and all being before the Court, the question of lack of jurisdiction was insignificant. See Des Moines Navigation and R.R. Co. v. Iowa Homestead Company, 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 212 (1887).

F.Supp. 593 (N.D.Ga. 1975):

> "Stated simply, since the business trust has the status of an unincorporated association, its citizenship will control the issue of diversity even if the plaintiff were allowed to substitute the individual trustees as the named plaintiffs. The court is of the opinion that to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants. To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one trustee or two or fewer than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philosophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto uncovered broad categories of litigants it ought to be done by the Congress and not the courts."405 F.Supp. at 595.

The majority's approach of determining diversity jurisdiction "on a case by case basis (there being no statutory model) to determine which class [of membership in the organization] has exclusive power to control and manage the trust" will, as pointed out by the dissenting opinion, lead to divergent results and an entire new body of jurisdictional precedents where none is necessary.

The Court's analysis limiting *Bouligny* to labor unions is not a fair reading of that case. The court

there simply held that the citizenship of an unincorporated association is that of each of its members. To restrict the application of *Bouligny* to labor unions is to create a sort of "second-class citizenship" for such an association.

In summary, the opinion of the Court of Appeals in sustaining diversity jurisdiction constitutes the extension of that right to a class of litigants not heretofore contemplated by Congress and an open invitation to use artificial means to create subject matter jurisdiction which otherwise would not exist. The decision in this case overrules not only all prior decisions of the district courts where the issue was squarely presented, but conflicts with the Third Circuit's opinion in *Riverside Memorial Mausoleum, supra,* and the controlling precedents established in *Bouligny* and *Morrissey*, supra. It is respectfully submitted that the opinion of the panel majority is in error and should be reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States should grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550 and that upon due consideration the opinion of the Court of Appeals should be reversed and the dismissal of this case for want of jurisdiction by the district court affirmed in all respects.

Respectfully submitted,

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Lawrence F. LEE, Jr., et al.

v.

NAVARRO SAVINGS ASSOCIATION.

No. CA 3-74-1231-C.

United States District Court,
N. D. Texas,
Dallas Division.

July 28, 1976.

Trustees of Massachusetts real estate investment trust brought action against savings association to recover for alleged breach of loan commitment agreement. Defendant moved to dismiss for want of subject matter jurisdiction. The District Court, William M. Taylor, Jr., Chief Judge, held that since, among other things, plaintiff was an investment vehicle authorized to issue negotiable shares for public offering, its citizenship, for diversity purposes, was governed by the citizenship of the beneficiaries rather than that of the trustees, that fact that trust was presently under supervi-

sion of bankruptcy court did not warrant a different conclusion since diversity was to be determined as of time action was commenced, i. e., prior to filing of bankruptcy orders, that fact that trust did not presently qualify as a real estate investment trust for federal tax purposes also did not require a different result on question of diversity jurisdiction, that since state law allowed real estate investment trusts to sue and be sued as entities plaintiffs could not bring suit as a class action, that jurisdiction could not be founded on the Bankruptcy Act where defendant did not consent to suit and that federal question jurisdiction was absent since there was no valid claim under the federal securities laws.

Case dismissed.

1. Courts ⇐315

For diversity purposes, a real estate investment trust is governed by the citizenship of each of its beneficiaries, rather than by the citizenship of the trustees. 28 U.S.C.A. § 1332(a).

2. Courts ⇐315

Massachusetts real estate trust, which was an investment vehicle authorized to issue negotiable shares for public offering, was to be treated as an unincorporated association for purposes of diversity jurisdiction; hence, citizenship of beneficiaries, rather than that of the trustees, was determinative. 28 U.S.C.A. § 1332(a).

3. Courts ⇐315

Enactment of legislation permitting real estate investment trusts to escape taxation as associations did not overrule the Morrissey decision, which concluded that business trusts should be taxed as unincorporated associations rather than as ordinary trusts, which principle was used for purpose of determining diversity jurisdiction in suits involving business trusts. 28 U.S.C.A. § 1332(a); 26 U.S.C.A. (I.R.C.1954) §§ 856–858.

4. Courts ⇐315

Diversity is determined as of time the action is commenced; hence, fact that trust

was under supervision of a bankruptcy court which, at least, temporarily suspended all powers of the shareholders over the trustees did not mean that, for diversity purposes, reference was to be had to the citizenship of the trustees, rather than the beneficiaries, since the bankruptcy orders were not entered until after action was commenced. 28 U.S.C.A. § 1332(a).

5. Courts ⇐315

Fact that powers of trustees of Massachusetts business trust were very broad did not require that, for purpose of diversity jurisdiction, citizenship was to be determined by reference to the trustees, rather than to the beneficiaries. 28 U.S.C.A. § 1332(a).

6. Courts ⇐315

Fact that Massachusetts business trust did not presently qualify as a real estate investment trust for federal tax purposes did not require that, for purpose of diversity jurisdiction, citizenship be determined by

reference to the trustees, rather than the beneficiaries since its intrinsic nature and purpose as a business enterprise were such that it could not be treated as either a corporation or an ordinary trust. 28 U.S.C.A. § 1332(a).

7. Federal Civil Procedure ⇐181

Mere fact that every party-plaintiff named as a class representative in suit was a citizen of a state other than that of the defendant did not mean that suit brought by Massachusetts business trust could be maintained as diversity class action suit since state law allowed real estate investment trusts to sue and be sued as entities and, hence, suit could not properly be brought as a class action. Fed.Rules Civ. Proc. rules 17(b), 23.2, 28 U.S.C.A.; Vernon's Ann.Tex.Civ.St. art. 6138a, § 6(A)(2).

8. Federal Civil Procedure ⇐181

Civil rule providing that members of an unincorporated association may bring suit as a class by naming certain members as representative parties must be read in conjunction with rule that the capacity of an unincorporated association to sue is to be

determined by the law of the state in which the district court is held; hence, if state law allows the association to sue as an entity, then a class action is not available. Fed. Rules Civ.Proc. rules 17(b), 23.2, 28 U.S.C.A.

9. Bankruptcy ⇐293(4)

Bankruptcy Act did not confer jurisdiction on federal district court of suit brought by Massachusetts business trust to recover damages resulting from alleged breach of loan commitment agreement, on theory that in any suit brought by the receiver or trustee the defendant could consent to jurisdiction where none would otherwise exist, where defendant never consented to federal jurisdiction; fact that it was not until three months after plaintiffs filed their complaints alleging diversity jurisdiction that defendant moved to dismiss for want of jurisdiction did not constitute implied consent to jurisdiction since motion to dismiss was filed before plaintiffs submitted their first amended complaint, which raised issue of Bankruptcy Act jurisdiction. Bankr.Act, § 23, sub. b, 11 U.S.C.A. § 46(b).

10. Securities Regulation ⇐12

Savings association's loan commitment letter was not a "security" within the meaning of the Securities Exchange Act. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

11. Securities Regulation ⇐1

Securities Exchange Act was not intended to insure American businesses against bad debts. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

James A. Ellis, Jr., Carrington, Coleman, Sloman, Johnson & Blumenthal, Dallas, Tex., for plaintiffs.

Bernus Wm. Fischman, Lackshin, Nathan & Berg, Houston, Tex., Lawrence Fischman, Weil, Craig & Fischman, Inc., Dallas, Tex., William P. Weir, Fort Worth, Tex., for defendant.

MEMORANDUM OPINION AND ORDER

WILLIAM M. TAYLOR, Jr., Chief Judge.

This suit was brought by the above named plaintiffs as trustees of Fidelity Mortgage Investors (FMI), a Massachusetts business trust, against defendant Navarro Savings Association for damages resulting from the breach of a loan commitment agreement.

Defendant has moved to dismiss the case for want of subject matter jurisdiction, F.R. C.P. 12(b)(1). Plaintiffs have responded by amending their complaint to allege four separate grounds upon which jurisdiction might properly be based. The Court has reviewed each of those grounds, and finds that none is strong enough to repel defendant's jurisdictional attack.

DIVERSITY OF CITIZENSHIP

Plaintiffs primarily contend, in opposition to defendant's motion to dismiss, that when a real estate investment trust (REIT), such

as FMI, brings suit in federal court, the citizenship of the trustees, not the beneficiaries, is the determinative factor for diversity purposes. Under this view of the law, jurisdiction of this Court would be proper under 28 U.S.C. § 1332(a), since none of the plaintiff trustees are citizens of Texas.

Defendant disputes plaintiffs' contention, citing several recent cases in which other federal district courts have held that for diversity purposes, an REIT is an unincorporated association in which case the citizenship of the beneficiaries is controlling, not the citizenship of the trustees.

Larwin Mortgage Investors v. Riverdrive Mall, Inc., 392 F.Supp. 97 (S.D.Tex.1975) was the first reported case to address this issue. In that case, Judge Cox reviewed the plaintiff's claim that for diversity purposes, an REIT should be treated either as a corporation or as an ordinary trust. If an REIT were a corporation, then citizenship would be determined by looking to the state of incorporation or principal place of business. If a trust, then citizenship of the

trustees would be determinative.[1]

Feeling constrained by the United States Supreme Court's opinions in *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935), Judge Cox held that for diversity purposes, a business trust which qualified as an REIT under the Internal Revenue Code must be treated as an unincorporated association, making the citizenship of each of the beneficiaries determinative of jurisdiction.[2]

1. Plaintiffs in the case at bar have not contended that FMI should be treated as corporation for diversity purposes; only that it should be treated as a trust.

2. Judge Cox' reliance on *Bouligny* and *Morrissey* was well-placed. The issue before the Court in *Bouligny* was whether a labor union, for diversity purposes, is a citizen of the state of its principal place of business, or a citizen of the state of each of its members. The Court opted for the latter view, suggesting that any expansion of diversity jurisdiction was a matter for the Congress, not the Courts.

Although *Larwin* was the first case to explore the issue of REIT citizenship for diversity purposes, it has not been the last. Other federal district courts have considered the question, and each one has concurred in the *Larwin* result. *See Saul v. Farnale, Inc.*, Civil Action No. 74-H-128 (S.D.Tex., July 8, 1975), and *Risk v. Jones*, Civil Action No. 75-97A (N.D.Ga., June 19, 1975).

[1] Against the above authority, plaintiff trustees of FMI have asserted their belief that *Larwin* was incorrectly decided, and have offered several arguments in support of that belief. At the time those arguments were urged by plaintiffs, the issue of REIT citizenship was one of first impression in this Court. That is no longer the case. This Court has subsequently rendered a decision in *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D.Tex.1976), in which it held that the citizenship of an REIT for diversity purposes is governed by the citizenship of each of its beneficiaries. That holding

must also apply to the case at bar.

[2] The jurisdictional facts in the two cases are virtually identical. Like the defendant REIT in *Lincoln*, FMI is a Massachusetts real estate trust,[3] organized under a Declaration of Trust. FMI is an investment vehicle authorized to issue negotiable shares for public offering.[4] The powers of FMI's trustees are nearly the same as those of the trustees in *Lincoln*, and the powers of the shareholders are equally similar. Given these similarities in fact, similarity in law must logically result.

> The Court in *Morrissey* was faced with a determination of the treatment of a business trust for tax purposes. It ultimately concluded that business trusts should be taxed as unincorporated associations rather than as ordinary trusts, reasoning that the object of a business trust is "not to hold and conserve particular property, . . . but to provide a medium for the conduct of a business and sharing its gains."
> 296 U.S. at 357, 56 S.Ct. at 295.

3. Declaration of Trust, Section 1.3

4. Declaration of Trust, Section 6.1

Most of the arguments asserted by FMI in support of its diversity claim were addressed by this Court in *Lincoln*. First, plaintiffs argue that the *Larwin* court's reliance on *Morrissey* was misplaced because *Morrissey* was a tax case, and the characterization of an entity for tax purposes should not control its characterization for diversity purposes. That argument was dispelled in *Lincoln*:

> The *Morrissey* analysis of types of entities and enterprises is clearly applicable to the case at bar, and dictates [the REIT's] treatment as an unincorporated association. Nothing in that opinion indicates that the Supreme Court would treat a business trust any differently for purposes of determining diversity jurisdiction.

Supra, at page 354.

[3] Second, plaintiff contends that Congress overruled much of *Morrissey* when it enacted legislation to permit REIT's to escape taxation as associations, under §§ 856–58 of the Internal Revenue Code of 1954.

Such an interpretation, however, reads too much into the statute. Congress did not alter *Morrissey's* definition of "business trusts," it merely granted more favorable tax treatment to REIT's. And absent more explicit legislation, this Court will adhere to the *Morrissey* definition. For, as the Supreme Court concluded in *Bouligny*, "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the Courts." *Supra*, 382 U.S. at 150–51, 86 S.Ct. at 275.

[4, 5] Plaintiffs additionally maintain that as trustees of FMI, their powers over the trust are so broad that the citizenship of each of them should control for the purpose of determining diversity jurisdiction. They attempt to buttress this argument with the fact that FMI is now under the supervision of a Bankruptcy Court,[5] which at least temporarily suspends all powers of its shareholders over its trustees.

5. See affidavit of Arthur Milam, which contains the bankruptcy court orders.

This latter argument is not valid. Diversity is determined as of the time the action is commenced, *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U.S. 552, 19 S.Ct. 817, 43 L.Ed. 1081 (1899), and the bankruptcy orders upon which plaintiffs rely were not entered until after the case at bar was commenced on December 13, 1974.

As to plaintiffs' main argument that the trustees' powers are so broad as to make their citizenship determinative of jurisdiction, this Court need only commend plaintiffs to *Lincoln* which dealt with trustees' powers of similar scope:

> When one considers the . . . characteristics of [the REIT] in light of the Supreme Court's analysis [in *Morrissey*], it becomes manifestly clear that [the REIT] is not an ordinary trust. It is a business trust or association, and, in view of the mandate to narrowly construe and define diversity jurisdiction, this Court cannot treat it as an ordinary trust for diversity purposes. Rather, it must be treated as an unincorporated association (footnote omitted).

Supra, at page 354.

[6] Plaintiffs finally suggest that *Larwin* is inapplicable to their case, because FMI is not now qualified as an REIT for tax purposes. The Court responded to this same suggestion in *Lincoln*:

> This argument is without merit. The issue before the Court turns not upon an election by [defendant] under the tax code which results in its being a "real estate trust" rather than a "real estate investment trust," but rather upon the intrinsic nature and purpose of [defendant] as a business enterprise.

Supra, at page 354. Although FMI is not officially recognized as an REIT for tax purposes, its "intrinsic nature and purpose" as a business enterprise are such that it cannot be treated as either a corporation or an ordinary trust. Hence the citizenship of its shareholders must be the determinative factor for diversity purposes.

CLASS ACTION

[7, 8] Plaintiffs have alternatively alleged that suit has been properly brought in this Court as a class action under FRCP 23.2. That rule provides that members of an unincorporated association may bring suit as a class by naming certain members as representative parties, provided that those parties "will fairly and adequately protect the interests of the association and its members."

Not coincidentally, every party-plaintiff named as a class representative in the case at bar is a citizen of a state other than Texas. Therefore, plaintiffs contend, the diversity of citizenship requirement has been met.

The Court is not so inclined. Rule 23.2 must be read in conjunction with Rule 17(b), which orders that the capacity of an unincorporated association to sue be determined by the law of the state in which the district court is held. If state law allows the association to sue as an entity, then a class action under Rule 23.2 is not available.

Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R.1971).

Since Texas law allows REIT's to sue and be sued as entities, Tex.Rev.Civ.Stat.Ann. art. 6138A § 6(A)(2) (1961), plaintiffs cannot properly bring this suit as a class action.

BANKRUPTCY JURISDICTION

[9] Absent diversity or class action jurisdiction, plaintiffs further contend that § 23(b) of the Bankruptcy Act[6] confers jurisdiction on the Court because 1) a debtor-in-possession occupies the same position as a receiver or trustee, and 2) under the Bankruptcy Act, a defendant, in a suit brought by a receiver or trustee, can consent to jurisdiction where none otherwise would exist.

6. Section 23(b) reads as follows: "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act." 11 U.S.C. § 46(b) (1964).

The Court does not reach the question of whether plaintiff trustees, as debtors-in-possession, occupy the same position as receivers in bankruptcy, because it is clear from the facts that defendant has never consented to jurisdiction in this cause.

A brief review of pertinent facts is in order. Plaintiffs filed their complaint on December 13, 1974, alleging jurisdiction based on diversity of citizenship. On January 10, 1975, defendant answered, and requested a stay of the proceedings. On January 30, 1975, plaintiffs were adjudged debtors-in-possession of FMI. Defendant did not file its motion to dismiss for want of jurisdiction until March 16, 1976, and plaintiffs now claim the delay served to imply consent to jurisdiction.

The Court is not persuaded. The cases cited by plaintiffs that deal with consent involved suits brought by persons in their capacities as receivers or trustees in bankruptcy. The case at bar does not fall into that category.

Plaintiffs should be reminded that de-

fendant's motion to dismiss was filed *before* plaintiffs submitted their first amended complaint, which effectively superseded their original complaint. 3 J. Moore, Federal Practice ¶ 15.08[7] (2d ed. 1975). They should also take note of the well established principle that "[i]t is never too late for a party, or the court on its own motion, to assert lack of jurisdiction over the subject matter." C. Wright, Federal Courts § 69, at 292 (2d ed. 1972).

FEDERAL QUESTION JURISDICTION

[10, 11] Plaintiffs' hodge-podge of jurisdictional allegations ends with a claim that their injuries were the result of defendant's violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and its implementing Rule 10b–5, 17 C.F.R. § 240.10b–5 (1975). Plaintiffs have alleged no facts in support of this claim, and perhaps rightly so, since it has absolutely no merit.

Suffice it to say that 1) defendant's commitment letter is not a "security," *see Unit-*

***ed Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), *cf. United States v. Austin*, 462 F.2d 724 (10th Cir. 1972), and 2) the Securities Exchange Act of 1934 was never intended to insure American businesses against bad debts. As the Fifth Circuit noted in *Bellah v. First National Bank of Hereford*:**

> We doubt that Congress intended by [this Act] to render federal judges the guardians of all beguiled makers or payees.

495 F.2d 1109 at 1113–14 (5th Cir. 1974).

Having reviewed each of the jurisdictional allegations offered by plaintiffs, the Court is of the opinion that it lacks jurisdiction over the subject matter of this lawsuit. Accordingly, the case must be dismissed.

Michael McHALE, Plaintiff,

v.

David MATHEWS, Secretary of Health, Education and Welfare, Defendant.

No. 75 Civ. 5636–LFM.

United States District Court,
S. D. New York.

July 30, 1976.

Claimant sought review of denial of disability benefits by the Secretary of Health, Education and Welfare. The District Court, MacMahon, J., held that testimony by vocational expert that there were a number of office and factory jobs in the area which the claimant could perform sustained denial of benefits.

Dismissed.

1. Social Security and Public Welfare ⇐149

Judicial review of denial of disability benefits by the Secretary of Health, Education and Welfare is limited to a determination of whether the Secretary's administrative decision is supported by substantial evidence. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

2. Social Security and Public Welfare ⇐149

Decision of administrative law judge to deny disability benefits became the final decision of the Secretary of Health, Education and Welfare when it was approved by the appeals council.

3. Social Security and Public Welfare ⇐143.5(2)

Eligibility for disability insurance benefits under social security requires a showing by a claimant that he is unable to engage in substantial gainful activity by reason of a physical or mental impairment which can be expected to result in death or to last for a continuous period of at least 12 months. Social Security Act, § 223(d), 42 U.S.C.A. § 423(d).

4. Social Security and Public Welfare
⇐148

Determinations by the Secretary of Health, Education and Welfare as to the facts concerning claimant's disability are conclusive if supported by substantial evidence; rule applies not only as to findings of basic evidentiary facts but also as to the inferences and conclusions to be drawn from them. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

5. Social Security and Public Welfare
⇐148

Court cannot set aside Secretary of Health, Education and Welfare's denial of disability benefits if the record contains evidence which a reasonable mind would accept as adequate to support that determination. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

6. Social Security and Public Welfare
⇐143.5(10)

Testimony by vocational expert that 37-year-old carpenter who had suffered leg injury could, in view of his prior work as a

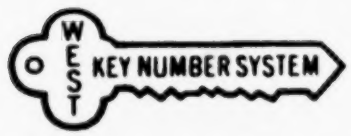
tion of the issues. The trial court can treat the pretrial order as amended by the consent of the parties. *See Mains v. United States*, 508 F.2d 1251, 1259 (6th Cir. 1975); *Bucky v. Sebo*, 208 F.2d 304, 305 (2d Cir. 1953). In such a case, the court properly can enter a judgment that decides issues outside the scope of the original pretrial order.

[4] The parties in this case disagree on whether they actually tried the entire patent. The district court's opinion notes that the other claims in the patent "are dependent upon claim 1 for their validity," but the record does not show whether the parties could present additional evidence with respect to the patent claims not identified in the pretrial order. We therefore vacate the part of the judgment that invalidates patent claims other than claims 1, 2, 3, and 7, and remand for the district court to determine whether the parties actually litigated or wish to litigate the remaining claims in the patent. After giving the parties an opportunity to adduce new evidence and

arguments on the remaining patent claims, the district court may amend the pretrial order and enter an appropriate judgment.

Accordingly, the judgment is affirmed insofar as it invalidates claims 1, 2, 3, and 7 of Patent No. 3,797,680 and declares that Perfection-Cobey has not infringed those claims. The judgment is vacated insofar as it invalidates other claims in the patent, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part; Vacated in part; and Remanded.



Lawrence F. LEE, Jr., et al.,
Plaintiffs-Appellants,

v.

NAVARRO SAVINGS ASSOCIATION,
Defendant-Appellee.

No. 76–3550.

United States Court of Appeals,
Fifth Circuit.

June 18, 1979.

A suit for breach of contract was dismissed by the United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, J., 416 F.Supp. 1186, for lack of jurisdiction. On appeal by the plaintiffs, the Court of Appeals, Ainsworth, Circuit Judge, held that in view of specific provisions of a declaration of trust, and in view of fact that a promissory note was specifically made payable to order of trustees, it was citizenship of plaintiff trustees, the real parties in interest, and not that of beneficiary shareholders to which the Court would look to discern diversity of citizen-

ship in an action brought by the trustees against a savings association for breach of commitment to lend money for payment of the note.

Reversed and remanded for trial on the merits.

Vance, Circuit Judge, dissented and filed opinion.

Federal Courts ⇐290

In view of specific provisions of declaration of trust, and in view of fact that promissory note was specifically made payable to order of trustees, it was citizenship of plaintiff trustees, the real parties in interest, and not that of beneficiary shareholders to which Court would look to discern diversity of citizenship in action brought by trustees against savings association for breach of commitment to lend money for payment of note. 28 U.S.C.A. §§ 1331, 1332; Fed.Rules Civ.Proc. rules 17(a), 23.2, 28 U.S.C.A.; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A.

§ 78a et seq.

James A. Ellis, Jr., Don R. Hanmer, Dallas, Tex., for plaintiffs-appellants.

Ernest E. Figari, Jr. (Institutional Investors Trust), David P. Seikel, Dallas, Tex., amicus curiae.

Bernus W. Fischman, Houston, Tex., Lawrence Fischman, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and AINSWORTH and VANCE, Circuit Judges.

AINSWORTH, Circuit Judge:

The question for decision is whether the district court correctly dismissed this suit for lack of jurisdiction.

Plaintiffs are eight individuals, all non-Texas citizens and trustees of Fidelity Mortgage Investors, a Massachusetts business trust (FMI), who filed this complaint

as representatives of FMI seeking damages for breach of contract against defendant Navarro Savings Association, a Texas corporation, in the sum of $1,174,525.17 plus interest and attorneys' fees.

Jurisdiction is asserted by plaintiffs under both the diversity of citizenship and federal question provisions of law. 28 U.S.C. §§ 1332, 1331. The district court rejected both bases of citizenship.[1] We disagree with the district court's ruling and hold that jurisdiction should have been maintained under diversity of jurisdiction. It is thus unnecessary that we consider

1. The district court in a written opinion held that the citizenship of each of the numerous shareholders of the trust rather than the eight trustee plaintiffs was determinative of jurisdiction and diversity of citizenship was therefore lacking. Other contentions of plaintiffs relative to the right to maintain a class action under Federal Rules of Civil Procedure, Rule 23.2 (pertaining to actions by representative parties on behalf of members of an unincorporated association), and to federal question jurisdiction under the Securities Exchange Act of 1934, were also denied.

whether there is also federal question jurisdiction.

According to the allegations contained in plaintiffs' complaint, on September 9, 1971, the president of Rockwall Estates, Inc. executed on behalf of the corporation a promissory note to plaintiffs in the amount of $850,000 to evidence money lent to the corporation. The note provided that the principal amount should become due and payable two years from the date thereof but interest payments were to be due and payable monthly. The promissory note provided in pertinent part as follows:

> FOR VALUE RECEIVED, the undersigned Rockwall Estates, Inc., (hereinafter sometimes referred to as "Maker"), hereby promises to pay to the order of Laurence F. Lee, Jr., Bert A. Betts, Roy B. Davis, Jr., N. Clement Slade, Jr., Robert M. Green, Luther H. Hodges, James B. McIntosh, Arthur W. Milam, Jack H. Quaritius, Frederick H. Schroeder and John W. York, not individually, but as Trustees of Fidelity Mortgage Investors,

a Massachusetts Business Trust, under Declaration of Trust dated May 29, 1969 (hereinafter referred to as "FMI") and their respective successor Trustees under said Declaration of Trust, with power to protect, manage, sell, deliver, transfer, endorse with or without recourse, modify, extend, consolidate, coordinate and spread with any other note, negotiate, collect, discharge, accelerate, enforce and/or without being limited by any of the foregoing deal in any manner with this note, the obligations represented thereby, and exercise any right or option contained in this note, the principal sum of Eight Hundred Fifty Thousand and 00/100 ($850,000.00) Dollars, or so much thereof that may be advanced, together with interest thereon from the date of advances on outstanding principal balance at the rate of five percent (5%) above the prime rate of interest charged by Morgan Guaranty Trust Company of New York, or its successors, on the business day preceding the first day of each successive month during the term hereof,

but shall in no case be in excess of one and one/half percent (1½%) per month.

According to the allegations of plaintiffs' suit, prior to and contemporaneously with the execution of the promissory note described, defendant Navarro Savings Association of Dallas, Texas, acting through its president, executed loan commitment letters to Rockwall Estates, Inc. dated July 26, 1971, which were delivered and accepted by Rockwall's president at the closing of the loan by FMI to Rockwall Estates, Inc. on September 9, 1971. Under these "take out" commitment letters defendant Navarro agreed to loan to Rockwall Estates, Inc. $850,000 any time between September 8, 1973 and August 31, 1974 "so that such sum could be used by Rockwall Estates, Inc. to pay to Plaintiff the sums due under the note to them."[2]

2. The pertinent Navarro Savings Association commitment letter to Rockwall Estates, Inc. dated July 26, 1971, which was accepted by Rockwall Estates, Inc. on September 9, 1971, reads in part as follows:

1. *Commitment.* Subject to and upon the

(continued)

footnote continued

terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars ($8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after September 8, 1973, and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars ($850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1½%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and all improvements, fixtures and personal property situated thereon (the "Mortgaged

(continued)

footnote continued

Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

. . . . .

8. *Pledge of Commitment.* This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. In the event this Commitment is pledged as security for a loan to Borrower from Fidelity Mortgage Investors under the terms of the commitment letter from Fidelity Mortgage Investors dated August 6, 1971, the holder of such loan, upon thirty (30) days written notice, may require Association to make the loan committed hereby prior to September 8, 1973; provided, however, at the time of such notice and at the time of closing of the loan, Borrower must have been delinquent for more than sixty (60) days in

(continued)

Plaintiffs also alleged that on August 5, 1971, the president of defendant Navarro sent to FMI through Ronald L. Langley for its advisors a letter agreement (attached as an exhibit) which provided that Navarro would either purchase the Rockwall mortgage note of $850,000 or make available funds for additional loan at any time the note becomes delinquent. It was further alleged that on September 9, 1971, at the closing of the loan by FMI to Rockwall, the president of defendant Navarro executed and delivered the loan commitment letters and orally stated to FMI's representative that the commitment fee had been actually received by Navarro. Thereafter, on September 10, 1971, the president of Rockwall assigned in writing the commitment letters and obligations of defendant Navarro to FMI. It is alleged that it was upon reliance of the assignment and commitment letters

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footnote continued

the payment of installments due on the loan from Fidelity Mortgage Investors and Borrower must have complied with all the terms and provisions of this Commitment.

that the loan of $850,000 was made by FMI to Rockwall.

Plaintiffs further alleged that when Rockwall Estates, Inc. became sixty days' delinquent in the payment of installments due on its loan to FMI, FMI gave defendant Navarro notice to make the loan covered by its commitment, but Navarro "breached its obligation under the commitment to make the loan in question" causing FMI to foreclose on the Deed of Trust on real estate securing the note, and resulting in damages and a deficiency to plaintiffs in the amount of $174,525.17 plus interest and attorneys' fees as provided in the note plus $1,000,000 punitive and exemplary damages.

The allegations in the suit of plaintiffs, trustees of FMI, disclose that under Article III of the Declaration of Trust, "Trustees' Power," the trustees have the following general power (3.1):

> The Trustees shall have, without other or further authorization, *full, absolute and exclusive power, control and authority over the Trust Estate* and of the busi-

ness and affairs of the Trust, *free from any power and control of the Shareholders*, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right, subject only to the limitations contained in this Declaration. The Trustees may do and perform such acts and things as in their sole judgment and discretion are necessary and proper for carrying out the purposes of the Trust or conducting its business and affairs. The enumeration of specific powers shall not be construed as limiting the exercise of general powers or any other specific power. Such powers of the Trustees may be exercised without order of or resort to any court.

(emphasis supplied)

Article III, "Specific Powers," (3.2r) of the Declaration provides that the powers of the trustees shall include the power "[t]o collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon, or adjust, any actions, suits, claims, demands

or other litigation relating to the Trust, the Trust Estate or the Trust's affairs."

Article I of the Declaration of Trust (1.1) states in part that "the Trustees shall conduct and transact the activities of the Trust, make and execute all documents and instruments and sue and be sued in the name of the Trust or in their names as Trustees of the Trust."

A careful review of the Declaration of Trust, as indicated above, amply supports plaintiffs' contention that as trustees of FMI they are the real parties at interest, exclusively entitled to enforce the rights at issue in this case. In addition to the powers already enumerated, plaintiffs as trustees have absolute power to invest the capital and funds of the trust, to lend money, and to possess and exercise the rights incident to the ownership of mortgage loans. *See* Declaration of Trust, Article 3.2(a), (b), (c), (g) and (k). Article IV states that the trustees are "responsible for the general policies of the Trust and for such general supervision of the business of the Trust

conducted by officers, agents, employees, investment advisers or independent contractors of the Trust as may be necessary to insure that such business conforms to the provisions of this Declaration."

On the other hand, the shareholders' rights are extremely limited, since they are entitled only to the rights of equitable interest owners or beneficiary shareholders, without any powers of control or management whatsoever. For example, Article 6.2, "Rights of Shareholders," in the Declaration reads in pertinent part as follows:

> The Shareholders shall have no legal right, title or interest in or to the Trust Estate and shall have no right to a partition thereof during the continuance of the Trust. Shareholders shall, however, be the equitable beneficiaries of the Trust, but shall have only the rights provided for in this Declaration and in the Trustees' Regulations. Except with respect to matters in which the Shareholders are specifically given the right to vote by this Declaration, no action taken by

> the Shareholders at any meeting shall in any way bind the Trustees.

Thus, according to the allegations of the suit and accompanying exhibits, it is apparent that the general and specific powers relating to the management and control of the FMI trust repose in the eight trustees who are plaintiffs in this suit. The Declaration of Trust could not be more specific in this regard. Likewise, the Rockwall promissory note of $850,000 was specifically made payable to the order of the eight trustees, plaintiffs herein, in their capacities as trustees of FMI under the Declaration of Trust.

The effect of the district court's holding that the citizenship of each of the shareholders must be considered rather than the citizenship of the individual trustees, in practical effect, denies access to the federal courts of a business trust under diversity of citizenship jurisdiction since it is virtually impossible to establish the citizenship of each of the approximately 9,500 beneficiary shareholders.

Since the eight plaintiff trustees who are

charged with the power to sue and be sued on behalf of the trust, and who are the persons in actual control of the trust and the real parties in interest, are citizens of a state other than Texas, and Navarro Savings is a citizen of Texas, there is complete diversity between plaintiffs and defendant. We look, therefore, to the citizenship of the plaintiff trustees, not to that of the beneficiary shareholders, to discern diversity of citizenship in this case for purposes of jurisdiction.

The Declaration of Trust clearly and unequivocally states that the real parties in interest in matters affecting the FMI trust are the named trustees. Their right to prosecute the action is also provided by the Federal Rules of Civil Procedure, Rule 17(a), which reads in pertinent part as follows:

> *Every action shall be prosecuted in the name of the real party in interest.* An executor, administrator, guardian, bailee,

3. *Contra, Carlsberg Resources Corp. v. Cambria Savings & Loan Association*, 3 Cir., 1977,

> *trustee of an express trust*, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

(emphasis supplied)

Thus, under the Federal Rules of Civil Procedure the trustee of an express trust may sue in a representative capacity on behalf of the trust. FMI is not a party to these proceedings. The trustees of the trust are the plaintiffs, all of whom are of non-Texas citizenship. It is unnecessary, therefore, to look beyond the terms of the Declaration of Trust, the provisions of the promissory note, and the Federal Rules of Civil Procedure to determine that the true parties in interest in this case, in exclusive control of the trust, with the sole right to bring this action, are the eight trustee

plaintiffs.

The trust here is analogous to a limited partnership, and the citizenship of its beneficiary shareholders should not be counted in determining the existence of diversity jurisdiction. The citizenship of the shareholders should be disregarded in the same manner as was done by the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 1966, 358 F.2d 178, 184 (Friendly, J.), *cert. denied*, 385 U.S. 817, 87 S.Ct. 40, 17 L.Ed.2d 56 (1966), where the Court held that "a suit brought against a New York partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity." [3]

The Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U.Chi.L. Rev. 384, 407, states the real party in interest principle very succinctly:

> Thus, the principle unifying the apparently conflicting jurisdictional precedents

554 F.2d 1254; *Riverside Memorial Mausoleum, Inc. v. UMET*, 3 Cir., 1978, 581 F.2d 62.

> is not the "persons composing" rule *but the "control" or "real party" concept.* The members of joint stock companies, limited partnership associations, and general partnerships "count" for diversity purposes because all the members exercise management powers. This control is manifested in several ways: in the management role of the respective members, their rights with respect to entity property, their ability to effect dissolution of the entity, their liability for the entity's debts and obligations, and in their capacity to sue and be sued on behalf of the entity. Corporate shareholders and *trust beneficiaries, in contrast, have only "equitable" interests in their respective entities.* Because limited partners do not enjoy the requisite control over the partnership, they have only an "equitable" interest in proceedings brought by or against the partnership, and thus, like corporate shareholders and *trust beneficiaries, should not be counted for diversity purposes.* The result in *Colonial Realty*, far from expanding the diversity jurisdiction,

is but an application of a principle underlying the Supreme Court's diversity jurisdiction decisions over the past 125 years.

(emphasis supplied) (footnotes omitted) The same Comment discusses the holdings in the *Colonial Realty* and opposing *Carlsberg Resources* cases in the following reasoned manner:

> The Second Circuit, in *Colonial Realty Corp. v. Bache & Co.*, departed from the tradition of dogmatic application of the *Chapman-Great Southern* rule and held that in suits involving limited partnerships the citizenship of only the general partners is relevant for diversity purposes. The court relied on the statutory distribution of *rights, powers, and responsibilities* between the general and the limited partners in concluding that the latter should be disregarded in determining diversity. Although the decision has been followed by courts in the Second and Fourth Circuits, the Third Circuit, in *Carlsberg Resources Corp. v. Cambria Savings & Loan Association,* reached a contrary result, finding that *Colonial Realty* was not a proper interpretation of the "persons composing" test, but an unwarranted expansion of the scope of diversity jurisdiction. The majority in *Carlsberg Resources* read the body of Supreme Court precedent as conclusively foreclosing an approach that would distinguish between classes of association members.

Although the court in *Colonial Realty* did not fully develop the reasoning behind its decision, the result in that case stands on solid ground. Examination of *Chapman* and *Great Southern* reveals that those cases did not reject a distinction for jurisdictional purposes between classes of association members. On the contrary, the rationale for such a distinction can be culled from a comparison of the seemingly irreconcilable *Marshall* and *Chapman* decisions. In *Marshall* the Court observed that shareholders were not real parties to litigation involving a corporation and hence were irrelevant to the jurisdictional test. In *Chapman,* on the other hand, the joint stock company's

shareholders were clearly the parties controlling the company, and their personal assets stood behind the company's debts. The characteristics that compelled reference to all the association members in *Chapman* are not found in the case of limited partners, who are analogous to corporate shareholders. *A jurisdictional test that looks to the real parties to the controversy not only makes sense of the diversity precedents, but also accords well with the protective policy underlying the diversity jurisdiction, a policy which remains vital today.*

Id. at 417–18 (emphasis supplied).[4]

It is pertinent to note that the two Supreme Court cases principally relied upon by the district court as authority for dismissing this suit for lack of jurisdiction are inappropriate and inapposite. *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965), cited by the district court as authority for its holding that the citizenship of each of the beneficiary shareholders is decisive for purposes of diversity jurisdiction, does not pertain to the circumstances here. In *Bouligny* the question was whether an unincorporated labor union should be treated as a citizen for purposes of federal jurisdiction without regard to the citizenship of its members, and the Court answered in the negative. However, we do not read in *Bouligny* a general rule that the courts must look to all unincorporated associations' membership to determine diversity jurisdiction. The present case differs on its facts from *Bouligny* since, under the express provisions of the Declaration of Trust here, the trustees are designated as the ones in exclusive control of the trust, with power to sue and be sued on behalf of the trust, and no such authority is conferred on the beneficiary shareholders. Additionally, the Rockwall promissory note here was made payable to the trustees who brought this suit.

Bouligny is applicable only to business

4. Citations of cases referred to in the text, not otherwise shown, are as follows: *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889); *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900); *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 14 L.Ed. 953 (1853).

associations which seek federal court diversity jurisdiction as entities. Here, the trustees sue as individual representatives of the trust, and assert federal jurisdiction as such. No attempt is made by the individual parties to become entities as occurred in *Bouligny*. We note that the opinion in *Bouligny* does not inform us who to look to as the relevant members of the association whose citizenship determines diversity jurisdiction. In *Bouligny* the Court was concerned with an unincorporated association having only one class of membership. In the instant case, our real-party-in-interest analysis notes that there is no single class of membership, all with equal rights to control and management such as in a general partnership. In the present case, another class, the trustees, has the exclusive control and management of the trust and the sole right to sue and be sued. To decide which class of membership or shareholders should be counted for diversity jurisdiction purposes, it is necessary on a case-by-case basis (there being no statutory model) to determine which class has exclusive power to

control and manage the trust. Here, the trustees and their citizenship alone should be looked to for the purposes of determining if each of them is diverse from that of the defendant.[5] "[A] close reading of *Bouligny* suggests that the Court's language concerning the limitations of the judicial role can be restricted to the facts of the case. The Court's discussion of the difficulties of fashioning a test for labor union citizenship can be read as explaining why only Congress could extend citizenship to unions as entities." (footnote omitted) 45 U.Chi.L.Rev. 384, 392.[6]

5. *See* 13 Am.Jur.2d, Business Trusts § 98 (1964), which reads as follows:

> Jurisdiction of an action instituted in a federal court in the name of the trustees of a business trust will be governed by the residence of the trustees rather than the shareholders, even though the latter may have the beneficial interest and ultimate power of control of the business.

6. As the Comment in the Chicago Law Review states more explicitly:

> *Bouligny* should not be regarded as dispositive of all business trust cases. The determi-

Nor is the citation by the district court of *Morrissey v. Commissioner of Internal Rev-*

footnote continued

nation of proper parties for diversity purposes should not turn on whether the entity is of a "business" character, but on the allocation of rights and liabilities between the beneficiaries and the trustees. Analysis of the cases from the perspective of the "real party" principle suggests that some of the recent *REIT* cases may have been decided incorrectly. If a beneficiary of a business trust is truly a passive investor who has no significant voice in the management of the trust, like the limited partner he should not be deemed a party to the action.[179] Trust agreement terms that permit the beneficiaries to remove the trustees or to prevent transfers of trust property do not seem to vest the management of the trust in the beneficiaries; such provisions only give beneficiaries certain powers that corporate shareholders commonly wield.[180]

[179] Under the theoretical model of the business trust the role of the beneficiaries is clearly distinguishable from that of the shareholder in a joint stock company. The shareholders of a joint stock company choose and control the company's managers, who act as agents of the shareholders. Crane & Bromberg, *supra* note 32, at 179 n.19. Business trusts, on

(continued)

enue, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935), apposite. *Morrissey* involved the question of the taxing of a trust under existing statutory provisions. Diversity jurisdiction was not at issue. The Court held that the trust in *Morrissey* should be taxed in the same way as a corporation

footnote continued

the other hand, are non-statutory variations of traditional trusts. The Supreme Court, in *Hecht v. Malley*, 265 U.S. 144 (1924), defined a business trust as "an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may, from time to time, be the holders of transferable certificates issued by the trustees . . . ." *Id.* at 146. The business trust differs significantly from both the joint stock company and the general partnership in that the beneficiaries are not co-owners of the trust property. Rowley & Sive, *supra* note 32, at 632, 634. Legal title to trust property is vested in the trustees, while the beneficiaries have equitable title only.

[180] These powers are also comparable to those which limited partners may wield consistently with their limited partner status under more liberal limited partnership acts. *See Id.* at 415 & nn. 178 & 180.

under the statutory provision which defined a corporation for tax purposes as including " 'associations, joint-stock companies and insurance companies.' " The business trust there was held to be an unincorporated association.[7]

Neither *Bouligny* nor *Morrissey*, therefore, controls the present case.

This suit is, therefore, maintainable under diversity jurisdiction. We are, of course, aware that the Judicial Conference of the United States, by appropriate resolution, has requested that Congress change the law so that federal courts may be divested of diversity jurisdiction. However, until Congress amends the statute in this regard the federal courts are obliged to take those suits properly before them as diversity cases. This is such a case. Ac-

7. *Cf. Commissioner of Internal Revenue v. Horseshoe Lease Syndicate*, 5 Cir., 110 F.2d 748, 749, *cert. denied*, 311 U.S. 666, 61 S.Ct. 24, 85 L.Ed. 427 (1940); *see also Willowood Condominium Assn. v. HNC Realty Co.*, 5 Cir., 1976, 531 F.2d 1249, a case involving a REIT where diversity jurisdiction was held to be proper.

cordingly, the judgment of the district court dismissing the suit for lack of jurisdiction is reversed and the case is remanded to the district court for trial on the merits.

REVERSED AND REMANDED.

VANCE, Circuit Judge, dissenting.

The issue presented is whether for purposes of diversity jurisdiction the citizenship of a business trust is determined by the citizenship of its trustees, rather than that of its beneficiary shareholders. The majority has elected to resolve this question by undertaking a "real party in interest" analysis.[1] Concluding that the better view

1. The mere fact that legal title is vested in the trustees does not establish that they are the real parties. Nor is the fact that under the declaration of trust the trustees are the parties entitled to enforce the right dispositive of the issue. A party cannot unilaterally confer subject matter jurisdiction on a federal court by declaring who is to represent the trust in legal actions. This court should look beyond mere appellations to determine who is a real party in interest. *See Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972). The primary function of categorizing a party as real party is to insure that an

(continued)

would base such determination on the citizenship of each of the business trust's beneficiary shareholders, I dissent. This approach comports with the rule announced in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965): an unincorporated association has as its citizenship the domicile of each of its individual members.

The business trust is analogous to an unincorporated association. Unlike an ordinary trust, a business trust is primarily an investment vehicle whose object

footnote continued

judgment obtained by him will have its prop effect as res judicata. Advisory Committee Notes, 39 F.R.D. 85. Here, a judgment obtai ed by the trustees would have no greater pr clusive effect than a judgment secured by t beneficiary shareholders.

The majority's "real party in interest" anal sis necessitates ad hoc determinations a leads to divergent results. In some instances, trial judge may be forced to decide the meri of a case while determining the threshold juri dictional issue.

is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains.

Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 357, 56 S.Ct. 289, 295, 80 L.Ed. 263 (1935). Although *Morrissey* was only concerned with the tax status of a business trust, it does provide insight into its business character:

> What, then, are the salient features of a trust—when created and maintained as a medium for the carrying on of a business enterprise and sharing its gains—which may be regarded as making it analogous to a corporate organization? A corporation, as an entity, holds the title to the property embarked in the corporate undertaking. Trustees, as a continuing body with provision for succession, may afford a corresponding advantage during the existence of the trust. Corporate organization furnishes the opportunity for a centralized management through representatives of the members of the

corporation. The designation of trustees, who are charged with the conduct of an enterprise, who act "in much the same manner as directors," may provide a similar scheme, with corresponding effectiveness. Whether the trustees are named in the trust instrument with power to select successors, so as to constitute a self-perpetuating body, or are selected by, or with the advice of, those beneficially interested in the undertaking, centralization of management analogous to that of corporate activities may be achieved. An enterprise carried on by means of a trust may be secure from termination or interruption by the death of owners of beneficial interests and in this respect their interests are distinguished from those of partners and are akin to the interests of members of a corporation. And the trust type of organization facilitates, as does corporate organization, the transfer of beneficial interests without affecting the continuity of the enterprise, and also the introduction of large numbers of participants. The trust method also permits the

> limitation of the personal liability of participants to the property embarked in the undertaking.

Id. at 359, 56 S.Ct. at 296. The court then concluded that the business trust was sufficiently like a corporation that in reality it constituted an association rather than a traditional trust. *Id.* at 360, 56 S.Ct. 289.

The majority correctly notes that *Bouligny* addresses only the issue of an unincorporated association's domicile for diversity purposes when the association sues as an entity. It refuses, however, to apply *Bouligny* where, as here, individuals sue as representatives of the entity. It seems to me that such an approach honors form over substance [2] and ignores the underlying ra-

[2] Judge Hill, now a judge of this court, condemned the substitution of the trustees for the trust as named plaintiffs. As a district court judge he noted that:

> To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one Trustee or two or fewer

(continued)

tionale of *Bouligny*:

> pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.

United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. at 150–151, 86 S.Ct. at 275. If the decision in *Bouligny* were applied in this case, there is no alternative but to find that the citizenship of the beneficiary shareholders controls. This conclusion is in accord with *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978)

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footnote continued

than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philosophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL–CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto broad categories of litigants it ought to be done by the Congress and not the courts.

***Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga.1975).**

and is supported by the overwhelming weight of authority provided by district court holdings. *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D.Tex.1976); *Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga.1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425 (N.D.Ga.1975); *Larwin Mortgage Investors v. Riverdrive Mall, Inc.*, 392 F.Supp. 97 (S.D.Tex.1975); *Independence Mortgage Trust v. White*, 446 F.Supp. 120 (D.Or.1978); *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D.Pa. 1978); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F.Supp. 971 (N.D.Ill.1976); *Carey v. U. S. Industries, Inc.*, 414 F.Supp. 794 (N.D.Ill. 1976).

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry EDDY and Raymond Daniel Eddy,
Defendants-Appellants.

No. 78–5527.

United States Court of Appeals,
Fifth Circuit.

June 18, 1979.

Defendants were convicted in the United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., of two counts of unlawfully uttering and publishing as true checks drawn upon the United States Treasury, and they appealed. The Court of Appeals, Simpson, Circuit Judge, held that: (1) defendants could be charged as principals in uttering an instrument and convicted of aiding and abetting such offense even though words "aid and abet" did not appear in the indictment, and (2) evidence was not sufficient to support defendants' convictions either as principals

or as aiders and abetters.

Reversed.

1. Criminal Law ⇐80

Person can be charged as principal in uttering an instrument and be convicted of aiding and abetting such offense even though words "aid and abet" do not appear in the indictment. 18 U.S.C.A. §§ 2, 495.

2. Criminal Law ⇐1144.13(3)

In evaluating sufficiency of evidence to support conviction, Court of Appeals was required to view evidence adduced at trial in light most favorable to the Government.

3. Forgery ⇐44(3)

Where defendants' alleged guilt was predicated on government theory that they aided and abetted codefendant in uttering checks, elements which Government had burden of proving beyond reasonable doubt were not only those of offense of uttering, but also elements of offense of aiding and abetting. 18 U.S.C.A. §§ 2, 495.

4. Forgery ⇐16

Crime of uttering requires proof of putting forth a false writing, some attempt

to circulate a check by means of a fraudulent representation that it is genuine and also proof of defendant's intent to defraud. 18 U.S.C.A. § 495.

5. Criminal Law ⇐59(5)

Crime of aiding and abetting occurs if an individual associates himself with a criminal venture, participates in it as something he wishes to bring about, and seeks by his actions to make it succeed. 18 U.S.C.A. § 2.

6. Forgery ⇐44(3)

Evidence in prosecution for uttering as true checks drawn upon United States Treasury was not sufficient to support defendants' convictions either as principals or as aiders and abetters. 18 U.S.C.A. §§ 2, 495.

7. Criminal Law ⇐422(1)
Witnesses ⇐397

Testimony by Secret Service agent that codefendant told agent that codefendant received checks from defendants was not hearsay as it was not offered or admitted to prove truth of matter asserted but rather for limited purpose of impeaching codefend-

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK and JACK H. QUARITIUS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari Filed: **September 19, 1979**
Writ of Certiorari Granted: **November 26, 1979**

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INDEX

Relevant Docket Entries

1. December 13, 1974: Original Complaint filed.
2. April 14, 1976: Affidavit of Arthur Milam filed.
3. April 15, 1976: Respondents' Amended Complaint filed.
4. May 5, 1976: Petitioner's Amended Answer filed.
5. July 28, 1976: District Court Memorandum Opinion and Order.
6. August 26, 1976: Notice of Appeal filed.
7. July 18, 1979: Circuit Court of Appeals' Opinion and Judgment.
8. July 3, 1979: Motion for Rehearing *En Banc* in the Circuit Court of Appeals filed.
9. August 1, 1979: Order Overruling Motion for Rehearing *En Banc*.
10. August 15, 1979: Stay of Mandate in the Circuit Court of Appeals filed.
11. September 19, 1979: Petition for Writ of Certiorari filed.
12. October 25, 1979: Brief in Opposition filed.
13. November 26, 1979: Petition for Writ of Certiorari granted.

Relevant Pleadings

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SHROEDER, JOHN W. YORK, JACK H. QUARITIUS	§	
Plaintiffs	§	CA3-74-1231-C
V.	§	
NAVARRO SAVINGS ASSOCIATION	§	
Defendant.	§	

FIRST AMENDED ORIGINAL COMPLAINT

The above-named Plaintiffs, Trustees of Fidelity Mortgage Investors, a Massachusetts business trust (hereinafter "FMI" or "Plaintiff"), complain of Defendant Navarro Savings Association as follows. The above-named Plaintiffs are individuals, all of whom are residents and citizens of states other than the State of Texas. They bring this action in their capacity as Trustees of FMI or only, in the event that

this Court finds that with Plaintiffs bringing this action in their capacity as trustees this Court lacks subject matter jurisdiction over this cause, as representatives of FMI and the owners of shares of FMI of whom there are approximately 9500. As such representatives, they will fairly and adequately protect the interests of FMI and the owners of shares therein. Defendant Navarro Savings Association is a corporation incorporated under the laws of the State of Texas having its principal place of business in the State of Texas. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. This Court has jurisdiction of this action under the provisions of Title 28, U.S.C., §1332.

Additionally, on January 31, 1975, an order was entered by the Federal District Court of the Southern District of New York in a Chapter XI Bankruptcy Proceeding styled *In Re Fidelity Mortgage Investors, Debtors,* Bankruptcy No. 75-B-54, by which order FMI was authorized as debtor-in-possession to operate its business and manage its properties through specifically listed trustees under the supervision of the Bankruptcy Court. This Court therefore has jurisdiction of this matter under §23 of the Federal Bankruptcy Act, 11 U.S.C. 146.

Additionally, the claims hereinafter asserted constitute, by the use of interstate commerce and the mail fraud, untrue statements, and deceit in connection with purchase and sale of a security, in violation of §10b of the Securities Exchange Act of 1934, 15 U.S.C. §781 (b) (1970) and its implementing Rule 10b-5, 17 C.F.R. §240.10b-5 (1975) and Plaintiffs or their beneficiaries have suffered damages as a result thereof in excess of $10,000.00, exclusive of interest and costs. This Court has jurisdiction of this claim under the provisions of Title 28, U.S.C., §1331, and this Court also

therefore has pendent jurisdiction over all claims alleged hereunder arising under or based on state law.

COUNT ONE

I.

On or about September 9, 1971, William Lee Folse, acting as president of Rockwall Estates, Inc., executed on behalf of Rockwall Estates, Inc., a promissory note to Plaintiff in the amount of $850,000, and such amount of money was lent by Plaintiff to Rockwall Estates, Inc. A true and correct copy of the promissory note is attached hereto as Exhibit A and incorporated herein for all purposes.

II.

Prior to or contemporaneously with the execution of the above-described note, Defendant Navarro, acting through its president James W. McPherson, executed commitment letters dated July 26, 1971, the last of which was accepted by William Lee Folse on behalf of Rockwall Estates, Inc., on September 9, 1971. True and correct copies of these two commitment letters are attached hereto as Exhibits B and C. By these "takeout" commitments, Defendant Navarro agreed to loan to Rockwall Estates, Inc., $850,000 at any time between September 8, 1973, and August 31, 1974, so that such sum could be used by Rockwall Estates, Inc., to pay to Plaintiff the sums due under the note to them. (Exhibit A)

III.

On or about August 5, 1971, James W. McPherson, acting as president and agent and representative of Navarro

Savings Association, sent to FMI, through Mr. Ronald L. Langley, for its advisers a letter agreement, a true and correct copy of which is attached hereto and incorporated herein for all purposes as Exhibit D.

VI.

On or about September 9, 1971, at the closing of the loan by FMI to Rockwall Estates, Inc., James W. McPherson, President of Defendant, actually or apparently on its behalf executed and delivered the documents copied as Exhibits B and C and orally stated to FMI's representative that the commitment fee had been actually received by Defendant.

V.

William Lee Folse, again acting as president of Rockwall Estates, Inc., assigned in writing the said commitment letters and the obligations of Defendant Navarro described therein to Plaintiff. A copy of this written assignment is attached hereto as Exhibit E and is incorporated herein for all purposes. Plaintiff FMI relied upon this assignment and the commitment letters being assigned and would not have loaned $850,000 to Rockwall Estates, Inc., without the benefit of the assignment of the commitment by Navarro and the takeout provisions therein.

VI.

In reasonable reliance upon the documents copied and attached hereto as Exhibits B, C, D, and E, and the promises, agreements, statements, and representations stated therein, and made to FMI at the closing on such date, on or about September 9, 1971, the Plaintiff FMI lent to Rockwall Estates, Inc., the sum of $850,000.

VII.

. In January of 1973 Rockwall Estates, Inc., had been more than sixty days delinquent in the payment of installments due on its loan to FMI, and, accordingly, FMI gave Defendant notice to make the loan covered by its commitment.

VIII.

Defendant breached its obligations under the commitment to make the loan in question or, in the alternative, anticipatorily breached its obligations in connection therewith. Consequently, as a result of such breach, Plaintiff foreclosed its Deed of Trust on the real estate securing the note to it by Rockwall Estates and, after the application of all credits and offsets due by reason thereof, Plaintiff suffered nevertheless damages and a deficiency in the amount of $174,525.17 plus contractual interest and attorney's fees as provided in the applicable promissory note.

COUNT TWO

IX.

All of the preceding paragraphs in the Amended Original Complaint are incorporated herein for the purposes of this Count Two.

X.

In the alternative to the rights of Plaintiff as described in Count One above, Plaintiff would show the Court that it is, and was intended to be, a third party beneficiary of the commitment letters attached as Exhibits B and C, as was

well known to Defendant Navarro as well as to Rockwall Estates, Inc. In fact, the commitment letters specifically refer to the loan from FMI. Plaintiff altered its position in reliance upon the commitment letters in that it accepted the $850,000 note of Rockwall Estates, Inc., and gave to Rockwall Estates, Inc., the proceeds of the note in reliance upon the commitment letters. The commitment letters were also made, in part, for the benefit of Plaintiff and were represented by the promissor, Navarro, to be a valid commitment.

XI.

Plaintiff has been damaged in the amount of $174,525.17 plus interest and attorneys' fees as above described, by virtue of the failure of Navarro to perform under its commitment agreements.

COUNT THREE

XII.

Defendant Navarro held out James W. McPherson as its President and officer, permitted him to use its stationery, and at no time indicated to Plaintiff that he lacked any authority to perform the acts which he did perform. Plaintiff FMI relied upon this apparent authority and Defendant Navarro intended that such reliance be had and intended to induce Plaintiff to make the $850,000 loan which it made to Rockwall Estates, Inc.

VIX.

If James W. McPherson lacked actual authority to execute the comitment letters and Exhibit D on behalf of

Defendant Navarro, or if the representations and promises in such documents or made at the closing of September 9, 1971, or prior thereto by such person were false, since Plaintiff FMI reasonably relied upon such representations and promises to its detriment, it has been defrauded by Defendant to its damages in the amount of $174,525.17 plus interest and attorneys' fees as described above. Additionally, by reason of such fraud, Plaintiff is entitled to recover the sum of $1,000,000 in punitive and exemplary damages.

THEREFORE, Plaintiff prays that the Defendant be summoned to appear and answer herein and that it recover its damages of $174,525.17 plus interest and attorneys' fees, plus the sum of $1,000,000 as punitive and exemplary damages, plus interests, costs of court, and general relief.

Respectfully submitted,

/s/ James A. Ellis, Jr.

Of CARRINGTON, COLEMAN, SLOMAN, JOHNSON & BLUMENTHAL
3000 One Main Place
Dallas, Texas 75250
214-741-2121

EXHIBIT A

PROMISSORY NOTE

$850,000.00 Dallas, Texas
September 9, 1971

FOR VALUE RECEIVED, the undersigned, Rockwall Estates, Inc., (hereinafter sometimes referred to as "Maker"), hereby promises to pay to the order of Laurence F. Lee, Jr., Bert A. Betts, Roy B. Davis, Jr., N. Clement Slade, Jr., Robert M. Green, Luther H. Hodges, James B. McIntosh, Arthur W. Milam, Jack H. Quaritius, Frederick H. Schroeder and John W. York, not individually, but as Trustees of Fidelity Mortgage Investors, a Massachusetts Business Trust, under Declaration of Trust dated May 29, 1969 (hereinafter referred to as "FMI") and their respective successor Trustees under said Declaration of Trust, with power to protect, manage, sell, deliver, transfer, endorse with or without recourse, modify, extend, consolidate, coordinate and spread with any other note, negotiate, collect, discharge, accelerate, enforce and/or without being limited by any of the foregoing deal in any manner with this note, the obligations represented thereby, and exercise any right or option contained in this note, the principal sum of Eight Hundred Fifty Thousand and 00/100 ($850,000.00) Dollars, or so much thereof that may be advanced, together with interest thereon from the date of advances on outstanding principal balance at the rate of five percent (5%) above the prime rate of interest charged by Morgan Guaranty Trust Company of New York, or its successors, on the business day preceding the first day of such successive month during the term hereof, but shall in no case be in

excess of one and one/half percent (1 1/2%) per month.

Interest hereon shall be due on the first day of each month for the preceding month (or the portion thereof following the date of this note), and shall be payable on or before the 15th of each month and at maturity. This note shall be in default if interest payments due on the first are not received by FMI by the 15th of each month, and upon such default this note shall bear interest at the rate of one and one-half percent (1 1/2%) per month from the first of the month in which such default occurs until payment of such interest due is received. The principal amount hereof shall be due and payable two years from the date hereof.

From time to time, without notice to any co-makers, endorsers or guarantors, this note may be extended or renewed in whole or in part and/or the rate of interest thereon may be changed or fees in consideration of loan extensions may be imposed and any related right or security thereof may be waived, exchanged, surrendered or otherwise dealt with and any of the actions mentioned in this note may be done, all without affecting the liability of the maker, co-makers and endorsers and guarantors, each of whom agrees to remain liable under this note until the debt represented hereby is actually paid in full to the holder. The release of any party liable upon or in respect of said note shall not release any other such party. Each of the guarantors, endorsers, co-makers and maker hereby waives presentment, demand or payment, protest and notice of non-payment and of protest and any and all other notices and demands whatsoever.

This note is secured by a Deed of Trust of even date herewith executed by the maker hereof and covering certain real property and improvements located in Rockwall County, Texas. It is expressly agreed that all of the covenants, conditions and agreements contained in said Deed of Trust and any Loan Commitment and/or Agree-

ment executed in connection therewith are hereby made part of this note.

To induce FMI to make the loan evidenced hereby, the undersigned represents and warrants that:

1. It is a corporation duly organized, validly existing and in good standing under the laws of Texas, has the power and authority to own its property and to carry on its business as now being conducted.

2. It is not in default under any provisions of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof or of any indenture or agreement to which it is a party or of any order, regulation, ruling or requirement of a court or public body or authority by which it is bound.

3. No action, suit or proceeding is pending or known to be threatened against it before any court or administrative agency which, by itself or taken together with other such litigation, involves a substantial amount not covered by insurance nor is any substantial basis for any such litigation known to exist.

4. The execution, delivery and performance of this note are within its corporate powers, have been duly authorized and do not violate any provision of law or of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof or of any indenture or agreement to which it is a party or of any order, regulation, ruling or requirement of a court or public body or authority by which it is bound.

5. It is not subject to any provision of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof, nor is it a party to any indenture or agreement, nor is it bound by any order, regulation, ruling or requirement of a court or public body or authority which will, under current or foreseeable conditions, materially adversely affect its normal operations or impair its financial

condition or prospects. No litigation is pending or known to be threatened against it which might have any such effect nor is any substantial basis for litigation known to exist.

6. The current balance sheet and the related statements of income and earned surplus, if any, heretofore delivered to FMI fairly and accurately represent the assets, liabilities, and financial condition and the results of its operations of and for the period covered thereby and have been prepared in accordance with generally accepted accounting principles applied on a basis consistently followed in all material respects throughout the period involved, and there are no contingent liabilities not disclosed thereby which involve a substantial amount. Since the date of such balance sheet, there has been no material adverse change in the assets, liabilities or financial conditions shown thereon.

7. It has good and marketable title to its properties and assets, including such properties and assets as are reflected in the balance sheet referred to in paragraph 6 above (except such assets as have been disposed of in the ordinary course of business subsequent to the date thereof).

8. All of its federal, state and other tax returns required by law to be filed have been filed, and all federal, state and other taxes, assessments and other governmental charges upon it or its properties which are due and payable have been paid. No federal income tax returns have been audited by the Internal Revenue Service for any of its taxable years. No additional assessments for any such taxable years are anticipated and all charges, accruals and reserves for federal taxes are deemed adequate.

9. No event has occurred and is continuing and no condition exists which constitutes or which after notice or lapse of time, or both, would constitute an event of default hereunder.

Upon the occurrence of any of the following events of

default; (a) default in the payment or performance of (i) any obligation of the undersigned to the holder hereof, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising (the "obligations"), or (ii) any obligation to the holder of any endorser or guarantor of any of the obligations; (b) loss, theft, substantial damage, sale or encumbrance to or of any property constituting collateral herefor or the making of any levy, seizure or attachment thereof or thereon or the failure to pay when due any tax thereon or, with respect to any insurance policy, any premium therefor; (c) default under any mortgage, deed of trust, security agreement, loan agreement or other document or instrument constituting collateral herefor; (d) dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors, by, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against the undersigned, or any endorser or guarantor hereof; (e) any representation, warranty, statement, certificate, schedule or report made herein or furnished in connection with the loan evidenced hereby shall prove to have been false or misleading in any material respect as of the time made or furnished; (f) default by the undersigned (as principal or guarantor or other surety) either in the payment of the principal of or premium, if any, or interest on any indebtedness for borrowed money (other than that evidenced hereby) or with respect to any of the provisions of any note, bond, debenture or similar obligation evidencing such indebtedness or of any agreement relating thereto and the continuance of such default beyond any period of grace provided with respect thereto; (g) acceleration of the maturity of any indebtedness of the undersigned for borrowed money; thereupon or at any time thereafter (such default not having been previously cured), at the

option of the holder, all obligations shall become immediately due and payable without notice or demand, provided, however, the undersigned shall have ten days from the receipt of written notice from Lender to cure any default other than the failure to pay principal or interest hereon as herein provided (or in the event such default cannot be cured within ten (10) days then within an additional reasonable period of time so long as the undersigned has commenced and is diligently pursuing curative action, provided, however, that such additional time shall not exceed fifty (50) days without the written agreement of FMI).

Any securities or other property of the undersigned, or any endorser or guarantor hereof in the possession of the holder may at all times be held as collateral for the payment and performance of the obligations and any and all obligations of any endorser or guarantor hereof to the holder, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. No waiver of any right shall be effective unless in writing and signed by the holder nor shall a waiver on one occasion be construed as a bar to or waiver of any such right on any future occasion.

While in default hereunder or under any of the terms of the Deed of Trust securing the same and after maturity, this note shall bear interest at the rate of one and one/half percent (1 1/2%) per month payable monthly on the first day of each month thereafter, in lieu of the rate hereinbefore specified. Should it become necessary to collect this note through any attorney, all parties hereto, whether maker, co-maker, endorser or guarantor, each severally agrees to pay all costs of collecting this note, including reasonable attorneys fees, whether collected by suit or otherwise.

As herein used the word "holder" shall mean the payee or any endorsee of this note who is in possession of it, or the bearer hereof, if this note is at the time payable to the bearer.

This note, and all rights and remedies with respect hereto, shall be determined as to their validity, construction, effect and enforcement, and in all other respects of the same or different nature, by the laws of Texas.

The maker may prepay all or any part of the principal amount of this note, provided that the maker shall give FMI thirty (30) days written notice of its intention and shall pay to FMI a prepayment penalty amounting to two percent (2%) of the face amount of this note. The maker may prepay all of the principal amount of this note with the proceeds of a permanent loan without penalty, provided that the Maker shall have given FMI thirty (30) days written notice of its intention. If FMI calls upon the permanent lender for funding under the terms of the permanent loan commitment there shall also be no prepayment penalty. By the term "permanent loan" is meant a loan to the Maker hereof for a term in excess of ten years, which loan is to be secured by the property covered by the Deed of Trust which secures this note, or the loan described by that certain Commitment of Navarro Savings Association given to the Maker hereof of even date herewith.

ROCKWALL ESTATES, INC.

By: /s/ William Lee Folse
William Lee Folse
Its: President

EXHIBIT B

Navarro Savings Association
West 3rd Avenue at North 12th Street
Corsicana, Texas 75110
Phone: 214 • 874-8251

July 26, 1971

Rockwall Estates, Inc.
Suite 2640, LTV Tower
Dallas, Texas, 75201

Attention:

Gentlemen:

1. *Commitment.* Subject to and upon the terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars ($8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after February 1, 1974 and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars ($850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate

being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1-1/2%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and improvements, fixtures and personal property situated thereon (the "Mortgaged Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

3. *Request for Loan.* Association shall have no obligation to make the Loan until the expiration of ninety (90) days after Borrower submits a written request therefor, which request must be received by Association not sooner than November 3, 1973 nor later than June 2, 1974.

4. *Conditions precedent to Loan.* Association shall have no obligation to make the Loan unless, on or before the Funding Date, Association receives each of the following, all of which must be in form and substance satisfactory in all respects to Association and its counsel:

(a) The duly executed Note and Deed of Trust and such other loan closing documents as Association may request:

(b) A mortgagee's title policy issued by a title company acceptable to Association, in the amount of the Loan

naming Association as the party insured, which policy must be dated the date of the closing of the Loan, guaranteeing that Association has a valid, first and prior lien on the Mortgaged Property, subject to no exceptions other than those approved by Association and its counsel;

(c) A current survey of the Mortgaged Property, prepared by a registered, professional engineer approved by Association, which survey shall locate all improvements, easements, roads and rights-of-way, shall show no encroachments upon the property, and shall contain the surveyor's certification as to the number of acres contained in the Mortgaged Property;

(d) Evidence satisfactory to Association that Borrower is duly incorporated, validly existing and in good standing under the laws of the State of Texas;

(e) Opinion of counsel for Borrower that: (i) Borrower is a duly organized and validly existing business and in good standing in the State of Texas; (ii) The Note, Deed of Trust and other Loan papers evidence valid and binding obligations of Borrower, enforceable in accordance with their terms; (iii) Borrower has complied with all provisions of the Interstate Land Sales Full Disclosure Act, or that compliance therewith is unnecessary; and (iv) such other conclusions as Association may request;

(f) Opinion of counsel for Association that: (i) the terms and conditions of this commitment have been complied with; and (ii) the Loan does not violate any applicable usury laws.

(g) Evidence satisfactory to Association that the security interests created by the Deed of Trust are duly perfected and are subject to no prior or equal security interests;

(h) Fire and extended coverage insurance policies, in the amount of the full insurable value of all insurable portions of the Mortgaged Property, with loss payable

to Association, issued by an insurer satisfactory to Association;

(i) Copies of resolutions of the board of directors of Borrower authorizing the execution and delivery of the Note, Deed of Trust and other Loan papers, and the performance of the terms thereof, accompanied by a certificate of the Secretary of Borrower, dated the date the Loan is made, that such copies are correct and complete;

(j) Certificate of incumbency for the officers of Borrower who execute the Note, Deed of Trust and other Loan papers;

(k) Evidence satisfactory to Association that: (i) Borrower has complied with all applicable laws, ordinances and regulations; (ii) the Loan is not subject to (or is otherwise exempt from) payment or withholding of the United States Interest Equalization Tax; (iii) Borrower is not insolvent; (iv) borrower has not committed an act of bankruptcy or made a general assignment for the benefit of all or most of its creditors; (v) no petition has been filed by or against Borrower under any provision of the National Bankruptcy Act, or under any insolvency, moratorium, debtor's relief or receivership laws; and (vi) the Mortgaged Property includes the clubhouse and pool, home/office facility and golf course described in the appraisal dated July 20, 1971, prepared by Real Estate Research Corporation;

(l) Such other evidence, opinions and documents as Association may request.

5. *Usury.* This commitment is being issued subject to the determination by Association and its legal counsel that the Loan, in its present form, does not violate applicable usury laws. It is not the intention of Association or Borrower to enter into a usurious transaction, and it is understood that if the agreements contained herein be usurious, any interest collected in excess of the legally permitted rate will be

refunded to Borrower, and the Note and Deed of Trust may at Borrower's option contain provisions to that effect.

6. *Expenses.* All expenses and fees in connection with the issuance of this commitment, or the making of the Loan shall be paid by Borrower, promptly after demand by Association, including, but not limited to, attorney's fees for Association's counsel, charges for title examination and insurance, charges for survey, and recording and filing fees.

7. *Reduction of Loan Amount.* It is contemplated that Borrower may, prior to the time the Loan contemplated hereby is funded, sell lots in the mobile-home subdivision which constitutes a part of the Mortgaged Property. The amount of the Loan shall be reduced by an amount equal to the number of lots which are unsold on the date hereof (such unsold lots being detailed on Exhibit "A" attached hereto) but which have been so sold by Borrower or which have been committed to be sold by Borrower prior to the funding date, times the applicable Loan Reduction Amount for each such lot, the Loan Reduction Amounts for each such lot being set forth on Exhibit "D" attached hereto and made a part hereof for all purposes. The Mortgaged Property shall not include the lots so sold or committed to be sold and for which the Loan amount has been reduced.

8. *Pledge of Commitment.* This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. *Governing Law.* No modification, consent, amendment, or waiver of any provisions of this commitment, or any related document, nor consent to any departure of Borrower therefrom, shall be effective unless the same shall be in writing and signed by an authorized representative of Association, and they shall be effective only in a specific

instance and for the purpose for which given. No notice to or demand on Borrower in any case shall, of itself, entitle Borrower to any other or further notice or demand in similar or other circumstances. No delay or omission by Association in exercising any power or right hereunder shall impair any such right or power or become construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such power preclude other or further exercise thereof, or the exercise of any other right or power hereunder. This commitment is binding upon and inures to the benefit of Borrower and Association, and their respective successors and assigns.

If the foregoing terms and conditions are acceptable to you, please indicate your acceptance thereof by signing in the space provided below on the enclosed counterpart of this letter. If the accepted counterpart hereof and the commitment fee have not been actually received by Association on or before 5:00 o'clock p.m., Central Daylight Time, on August 10, 1971, Association's offer herein to make the Loan shall terminate at such time.

Very truly yours,

NAVARRO SAVINGS ASSOCIATION

By: /s/ Jas. W. McPherson

ACCEPTED:

ROCKWALL ESTATES, INC.

By: /s/ Wm. Lee Folse
July 27, 1971

(Exhibit A to Exhibit B of the pleading [a property description] deleted by agreement)

EXHIBIT C

July 26, 1971

Rockwall Estates, Inc.
Suite 2640, LTV Tower
Dallas, Texas, 75201

Attention:

Gentlemen:

1. *Commitment.* Subject to and upon the terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars ($8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after September 8, 1973 and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars ($850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1-1/2%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest

being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and improvements, fixtures and personal property situated thereon (the "Mortgaged Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

3. *Request for Loan.* Association shall have no obligation to make the Loan until the expiration of ninety (90) days after Borrower submits a written request therefor, which request must be received by Association not sooner than June 8, 1973 nor later than May 31, 1974.

4. *Conditions precedent to Loan.* Association shall have no obligation to make the Loan unless, on or before the Funding Date, Association receives each of the following, all of which must be in form and substance satisfactory in all respects to Association and its counsel:

(a) The duly executed Note and Deed of Trust and such other loan closing documents as Association may request:

(b) A mortgagee's title policy issued by a title company acceptable to Association, in the amount of the Loan naming Association as the party insured, which policy must be dated the date of the closing of the Loan, guaranteeing that Association has a valid, first and prior lien on the Mortgaged Property, subject to no exceptions other than those approved by Association and

its counsel;

(c) A current survey of the Mortgaged Property, prepared by a registered, professional engineer approved by Association, which survey shall locate all improvements, easements, roads and rights-of-way, shall show no encroachments upon the property, and shall contain the surveyor's certification as to the number of acres contained in the Mortgaged Property;

(d) Evidence satisfactory to Association that Borrower is duly incorporated, validly existing and in good standing under the laws of the State of Texas;

(e) Opinion of counsel for Borrower that: (i) Borrower is a duly organized and validly existing corporation, with authority to transact business and in good standing in the State of Texas; (ii) the Note, Deed of Trust and and other Loan papers evidence valid and binding obligations of Borrower, enforceable in accordance with their terms; (iii) Borrower has complied with all provisions of the Interstate Land Sales Full Disclosure Act, or that compliance therewith is unnecessary; and (iv) such other conclusions as Association may request;

(f) Opinion of counsel for Association that: (i) the terms and conditions of this commitment have been complied with; and (ii) the Loan does not violate any applicable usury laws.

(g) Evidence satisfactory to Association that the security interests created by the Deed of Trust are duly perfected and are subject to no prior or equal security interests;

(h) Fire and extended coverage insurance policies, in the amount of the full insurable value of all insurable portions of the Mortgaged Property, with loss payable to Association, issued by an insurer satisfactory to Association;

(i) Copies of resolutions of the board of directors of Borrower authorizing the execution and delivery of the Note, Deed of Trust and other Loan papers, and the

performance of the terms thereof, accompanied by a certificate of the Secretary of Borrower, dated the date the Loan is made, that such copies are correct and complete;

(j) Certificate of incumbency for the officers of Borrower who execute the Note, Deed of Trust and other Loan papers;

(k) Evidence satisfactory to Association that: (i) Borrower has complied with all applicable laws, ordinances and regulations; (ii) the Loan is not subject to (or is otherwise exempt from) payment or withholding of the United States Interest Equalization Tax; (iii) Borrower is not insolvent; (iv) borrower has not committed an act of bankruptcy or made a general assignment for the benefit of all or most of its creditors; (v) no petition has been filed by or against Borrower under any provision of the National Bankruptcy Act, or under any insolvency, moratorium, debtor's relief or receivership laws; and (vi) the Mortgaged Property includes the clubhouse and pool, home/office facility and golf course described in the appraisal dated July 20, 1971, prepared by Real Estate Research Corporation;

(l) Such other evidence, opinions and documents as Association may request.

5. *Usury.* This commitment is being issued subject to the determination by Association and its legal counsel that the Loan, in its present form, does not violate applicable usury laws. It is not the intention of Association or Borrower to enter into a usurious transaction, and it is understood and agreed that should it be determined by applicable law that the agreements contained herein be usurious, any interest collected in excess of the legally permitted rate will be refunded to Borrower, and the Note and Deed of Trust may at borrower's option contain provisions to that effect.

6. *Expenses.* All expenses and fees in connection with the issuance of this commitment, or the making of the Loan shall

be paid by Borrower, promptly after demand by Association, including, but not limited to, attorney's fees for Association's counsel, charges for title examination and insurance, charges for survey, and recording and filing fees.

7. *Reduction of Loan Amount.* It is contemplated that Borrower may, prior to the time the Loan contemplated hereby is funded, sell lots in the mobile-home subdivision which constitutes a part of the Mortgaged Property. The amount of the Loan shall be reduced by an amount equal to the number of lots which are unsold on the date hereof (such unsold lots being detailed on Exhibit "A" attached hereto) but which have been so sold by Borrower or which have been committed to be sold by Borrower prior to the funding date, times the applicable Loan Reduction Amount for each such lot, the Loan Reduction Amounts for each such lot being set forth on Exhibit "D" attached hereto and made a part hereof for all purposes. The Mortgaged Property shall not include the lots so sold or committed to be sold and for which the Loan amount has been reduced.

8. *Pledge of Commitment.* This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. In the event this Commitment is pledged as security for a loan to Borrower from Fidelity Mortgage Investors under the terms of the commitment letter from Fidelity Mortgage Investors dated August 6, 1971, the holder of such loan, upon thirty (30) days written notice, may require Association to make the loan committed hereby prior to September 8, 1973; provided, however, at the time of such notice and at the time of closing of the loan, Borrower must have been delinquent for more than sixty (60) days in the payment of installments due on the loan from Fidelity

Mortgage Investors and Borrower must have complied with all the terms and provisions of this Commitment.

10. *Governing Law.* This Commitment and the loan shall be governed by the substantive laws of the State of Texas.

11. *Miscellaneous.* No modification, consent, amendment, or waiver of any provisions of this commitment, or any related document, nor consent to any departure of Borrower therefrom, shall be effective unless the same shall be in writing and signed by an authorized representative of Association, and then shall be effective only in a specific instance and for the purpose for which given. No notice to or demand on Borrower in any case shall, of itself, entitle Borrower to any other or further notice or demand in similar or other circumstances. No delay or omission by Association in exercising any power or right hereunder shall impair any such right or power or become construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such power preclude other or further exercise thereof, or the exercise of any other right or power hereunder. This commitment is binding upon and inures to the benefit of Borrower and Association, and their respective successors and assigns.

If the foregoing terms and conditions are acceptable to you, please indicate your acceptance thereof by signing in the space provided below on the enclosed counterpart of this letter. If the accepted counterpart hereof and the commitment fee have not been actually received by Association on or before 5:00 o'clock p.m., Central Daylight Time, on September 10, 1971, Association's offer herein to make the Loan shall terminate at such time.

Very truly yours,

NAVARRO SAVINGS ASSOCIATION
By: /s/ Jas. W. McPherson,
President

ACCEPTED: September 9, 1971

ROCKWALL ESTATES, INC.
By: /s/ Wm. Lee Folse, President

[Exhibits A, B, C, and D to Exhibit C of the Pleading are deleted from the Appendix by Agreement of the Parties].

EXHIBIT D

Navarro Savings Association
West 3rd Avenue at North 12th Street
Corsicana, Texas 75110
Phone: 214 • 874-8251

August 5, 1971

Mr. Ronald L. Langley
Vice President
Marketing
Performance Mortgage Advisors, Inc.
645 Riverside Avenue
Post Office Box 4214
Jacksonville, Florida 32201

REF: Rockwall Estates, Inc.
Mortgage Loan $850,000.

Dear Ron:

In regards to the above captioned loan, it is our understanding that the committee has approved such a loan for a period of 24 months instead of 36 months as it was submitted to you.

Also, you have requested a provision whereby Navarro

Savings Association will either purchase such note or make available funds for additional loan at any time your note becomes delinquent. This is acceptable with us with the provision that you give us 60 days written notice prior to any such action.

The 1% loan discount which you have requested at time of closing is acceptable with the applicant.

If any additional information or questions arise concerning this loan, certainly feel free to give us a call.

Yours truly,

NAVARRO SAVINGS
ASSOCIATION

/s/ Jas. W. McPherson

James W. McPherson
President

JWM:sl

EXHIBIT E

ASSIGNMENT

STATE OF TEXAS §
§ ASSIGNMENT
COUNTY OF DALLAS §

WHEREAS, by note dated September 9, 1971, Fidelity Mortgage Investors, a Massachusetts business trust, has loaned to Rockwall Estates, Inc. $850,000.00; and

WHEREAS, by Mortgage Loan Commitment of even date herewith, Navarro Savings Association has committed to loan Rockwall Estates, Inc. a sum not to exceed

$850,000.00 from and after June 8, 1973 and up to and including May 31, 1974; and

WHEREAS, said Navarro Loan Commitment contains a provision whereby Fidelity Mortgage Investors may call the Navarro Commitment under certain specified conditions; and

WHEREAS, Fidelity Mortgage Investors desires that Rockwall Estates, Inc. pledge and assign the said Navarro Loan Commitment to Fidelity Mortgage Investors, as security for Fidelity Mortgage Investors' loan to Rockwall Estates, Inc.;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

THAT, for and in consideration of the loan from Fidelity Mortgage Investors to Rockwall Estates, Inc., dated September 9, 1971, Rockwall Estates, Inc. hereby assigns and pledges to Fidelity Mortgage Investors that certain Loan Commitment of even date herewith between Rockwall Estates, Inc. and Navarro Savings Association.

EXECUTED this the 10th day of September, 1971.

Rockwall Estates, Inc.
By: /s/ William Lee Folse
William Lee Folse
Its: President

AMENDED ANSWER OF
NAVARRO SAVINGS ASSOCIATION

NAVARRO SAVINGS ASSOCIATION, Defendant files this, its Amended Answer to Plaintiffs' Amended Complaint, and for same shows:

1. *Motions To Dismiss on Jurisdictional Grounds:*

Pursuant to Rule 12(b)(1), Defendant moves to dismiss

this suit for want of subject matter jurisdiction, and in support thereof shows:

A. there is no diversity of citizenship between Plaintiffs and Defendant in that the residence of Fidelity Mortgage Investors is the same as that of its beneficial interest owners;

B. Defendant expressly objects to the exercise of subject matter jurisdiction and does not consent thereto, and therefore jurisdiction is not conferred by §23b of the Bankruptcy Act;

C. as this suit is not properly maintainable as a class action under Rules 23, 23.1 or 23.2, FRCP in that the claims of the beneficial interest owners of Fidelity Mortgage Investors are not in and to any specific assets, but are to the trust *res* as a whole, or if separable do not each exceed $10,000 exclusive of costs and interest, jurisdiction founded upon diversity cannot be based solely on the residences of the trustees suing as class representatives;

D. the Amended Complaint wholly fails to plead a cause of action under the Securities Exchange Act of 1934, and thus jurisdiction cannot be founded upon the existence of a federal question.

2. *Motions To Dismiss For Failure To State A Claim:*

Defendant moves, pursuant to Rule 12(b)(6) to dismiss Counts I, II and III of the Amended Complaint for failure to state a claim upon which relief can be granted. In particular, Defendant shows:

A. In connection with all three counts,

(1) Plaintiffs fail to allege that they or Rockwall Estates, Inc., under whom they claim, complied with all conditions precedent to funding of the alleged loan commitment made the basis of this suit; or

(2) that Plaintiffs exercised due diligence to mitigate their damages, if any, incurred by reason of the refusal of Defendant to fund the alleged loan commitment made the basis of this suit; and

(3) in any event Plaintiffs acquired no rights under the alleged commitment letter made the basis of this suit;

B. Further, with respect to all three counts, same fail to state a claim upon which relief can be granted, either alone, in conjunction with one another, or in conjunction with the allegations invoking the Securities Exchange Act of 1934.

C. In connection with Count II, Plaintiffs were not, as a matter of law, third party beneficiaries of the alleged loan commitment made the basis of this suit.

3. *Motions To Strike Portions of Pleadings:*

Pursuant to Rule 12(f), Defendant moves to strike the following enumerated portions of the Amended Complaint:

A. All references to the recovery of attorneys fees because Plaintiffs are not entitled to recover same as a matter of law.

B. All references to punitive or exemplary damages because Plaintiffs are not entitled to recover same as a matter of law.

C. The first full paragraph (unnumbered) on page two of the Amended Complaint invoking the jurisdiction of this Court on the basis of a federal question arising under the Securities Exchange Act of 1934 because neither said paragraph standing alone, nor in conjunction with the remainder of the Amended Complaint states a cause of action for violation of said statute.

D. Paragraphs VIII, IX (insofar as it incorporates VIII by reference), XI, and "VIX" (sic) because same

set forth an incorrect measure of damages.

4. *Answer To Allegations of Amended Complaint:*

Without waiving the above and foregoing motions, but still insisting upon same, Defendant shows:

A. Defendant admits the allegations in the first paragraph on page one with respect to its incorporation and principal place of business. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the remainder of said paragraph, which has the effect of a denial thereof.

B. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the factual allegations of the second unnumbered paragraph, which has the effect of a denial thereof. The last sentence of said paragraph is denied.

C. The allegations of the third unnumbered paragraph are denied.

D. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the matters set forth in Paragraphs I through V, inclusive, and as to the allegations of Paragraph VII with respect to Rockwall Estates, Inc. being delinquent in the payments on its loan, if any, from Fidelity Mortgage Investors, which has the effect of a denial thereof. Defendant admits that it received correspondence from an attorney for Plaintiffs concerning the funding of the alleged loan commitment made the basis of this suit.

E. The allegations of Paragraph VI and VIII are denied.

F. In response to Paragraph IX under Count II, Defendant incorporates by reference the preceding subparagraphs of this Paragraph 4.

G. The allegations of Paragraphs X and XI under

Count II are denied.

H. With reference to Paragraph XII under Count III, Defendant admits that McPherson was the President of Defendant and was authorized to use its stationery, but only pursuant to the business of Defendant. The remainder of said paragraph is denied.

I. The allegations of Paragraph "VIX" (sic) under Count III are denied.

5. *Affirmative Defenses:*

A. There was no consideration for the alleged commitment by Defendant made the basis of this suit to loan the sum of $850,000 to Rockwall Estates, Inc. or Fidelity Mortgage Investors. The consideration provided in the alleged commitment letter made the basis of this suit was never received by Defendant, and the actions of Plaintiffs alleged to be in reliance on said commitment are not, as a matter of law, consideration for such commitment.

B. Under the applicable statutes and regulations the loan transaction contemplated by the alleged commitment letter made the basis of this suit could not have been consummated in that the sum of $850,000 exceeded the amount which Defendant could have legally loaned to Rockwall Estates, Inc., or to any other one borrower. Further, McPherson, as President of Defendant, did not have authority to commit Defendant to a loan of such magnitude. Such facts were well known to Plaintiffs, their agents and attorneys, or by the exercise of reasonable diligence could have been ascertained. By reason of the legal inability of Defendant to make the loan, and the want of capacity on the part of McPherson to bind Defendant to make the loan, any obligation of Defendant under the alleged commitment letter made the basis of

this suit is void and unenforceable.

C. Neither Rockwall Estates, Inc. nor Fidelity Mortgage Investors complied with the conditions precedent to the obligation of Defendant under the alleged commitment letter made the basis of this suit, and therefore Defendant was under no duty to make the loan contemplated thereby.

D. The measure of damages claimed by Plaintiffs was not within the contemplation of the parties and was not the direct and proximate result of the breach of any duty or obligation owed by Defendant to Plaintiffs.

E. Plaintiffs failed to exercise reasonable efforts to mitigate their damages, if any.

F. Counts I, II and III, insofar as they purport to state claims under the Securities Exchange Act of 1934 are barred by the statutes of limitations applicable thereto. The cause of action, if any, asserted in Count III is in any event barred by the applicable statute of limitations.

G. At the time of the transactions made the basis of this suit, Plaintiffs, their agents, employees and attorneys failed to make due investigation into the capacity of Defendant to make a loan of $850,000 to Rockwall Estates, Inc., failed to make due investigation into the authority of McPherson to bind Defendant to such an obligation, and failed to make due investigation of whether the consideration for the alleged loan commitment had been paid or whether the conditions precedent to the obligation of Defendant thereunder had been satisfied, all of which acts and omissions constituted negligence and singularly and collectively were a proximate cause of any losses sustained by Plaintiffs.

H. Insofar as the transaction made the basis of this suit may be deemed to involve a security, which is denied, such security and transaction were exempt from registration, and were not in interstate commerce.

WHEREFORE, Defendant prays:

1. That this suit be dismissed for want of subject matter jurisdiction; or

2. that this suit be dismissed for failure to state a claim upon which relief can be granted; or

3. Defendant's Motions to Strike be sustained; and

4. Plaintiffs take nothing by their suit and Defendant be discharged therefrom with its costs.

OPINIONS OF THE COURTS BELOW

The Opinion of the District Court in Cause No. CA-3-74-1231-C is reported at 416 F. Supp. 1186 (U.S.D.C., N.D. Tex., 1976) and is reproduced in full in the Petition for Writ of Certiorari beginning at Appendix Page 1a.

The Opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3350 is reported at 597 F.2d 421 (5th Cir., 1979) and is reproduced in full in the Petition to Writ of Certiorari beginning at Appendix Page 27a.

OTHER MATTERS

Stipulation of the Parties

The parties orally stipulated in the District Court and in the Court of Appeals that the Trust had at all material times beneficial shareholders who were residents of the State of Texas.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LAWRENCE F. LEE, JR., ET AL	)	
	)	CIVIL AC-
	)	TION
V.	)	No. 3-74-
	)	1231
	)	
NAVARRO SAVINGS ASSOCIATION,	)	

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Arthur Milam, who being by me duly sworn, on oath stated the following:

My name is Arthur Milam and I am Secretary for Fidelity Mortgage Investors, and as such I have personal knowledge of the facts stated herein, and I am fully competent to testify to them.

The following persons are plaintiffs in the above-styled action and are current trustees of Fidelity Mortgage Investors: Robert M. Green, William B. Lane, Jr., Laurence F. Lee, Jr., James B. McIntosh, Jack H. Quaritius, Frederick H. Schroeder. All of the above-named trustees resided at the time of filing the above-styled action and at all times thereafter, and currently reside in and are citizens of states other than the State of Texas.

The following persons are plaintiffs and trustees and owners of shares in Fidelity Mortgage Investors: Laurence F. Lee, Jr., Jack H. Quaritius, Frederick H. Schroeder.

The documents attached hereto are true and correct

copies of the Declaration of Trust, the Amended and Restated Declaration of Trust, the Second Amended and Restated Declaration of Trust, the Third Amended and Restated Declaration of Trust, the Fourth Amended and Restated Declaration of Trust, and the Fifth Amended and Restated Declaration of Trust of Fidelity Mortgage Investors, as are on file in the Office of the Secretary of the Commonwealth of Massachusetts.

Also attached hereto is a true and correct copy of an Order Authorizing Debtor in Possession To Operate and Manage Business, issued by the United States District Court, Southern District of New York in the Chapter XI proceeding styled *In Re Fidelity Mortgage Investors, Debtors,* under Bankruptcy No. 75 B 154.

Prior to the amendments adopted at the shareholders meeting held on September 30, 1974, Fidelity Mortgage Investors operated in a manner intended to qualify under the terms of the Internal Revenue Code for treatment as a real estate investment trust, but subsequent to the adoption of those amendments Fidelity Mortgage Investors has not qualified as a real estate investment trust for purposes of special tax treatment under the Internal Revenue Code.

/s/ Arthur Milam
Arthur Milam

FIDELITY MORTGAGE INVESTORS
(A Massachusetts Business Trust)

FIFTH
Amended and Restated
Declaration of Trust

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to
FIDELITY MORTGAGE INVESTORS
Amended and Restated Declaration of Trust

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FIDELITY MORTGAGE INVESTORS AMENDED AND RESTATED DECLARATION OF TRUST

THIS DECLARATION OF TRUST, made the 29th day of May, 1969, in the County of Suffolk and Commonwealth of Massachusetts and recorded in the office of the Secretary of the Commonwealth of Massachusetts on May 29, 1969, is hereby amended pursuant to Section 8.3 thereof to read in its entirety as follows:

The Trustees hereby declare that all property, real personal or otherwise, tangible or intangible, and all other property of any description now held or hereafter acquired by or transferred to them in their capacities as trustees hereunder, together with the income and profit therefrom

and the proceeds thereof, shall be held by them in trust and shall be received, managed and disposed of for the benefit of the holders from time to time of the shares (the "Shareholders") being issued and to be issued hereunder and in the manner and subject to the terms and conditions herein provided. This instrument, together with all amendments hereto, is herein called this "Declaration". The term "Trustees" shall mean the trustees under this Declaration whether elected or appointed as hereinafter provided.

ARTICLE I

The Trust

1.1 Name. The trust created by this Declaration is herein referred to as the "Trust" and shall be known by the name "Fidelity Mortgage Investors". Except as otherwise provided herein, the Trustees shall conduct and transact the activities of the Trust, make and execute all documents and instruments and sue and be sued in the name of the Trust or in their names as Trustees of the Trust. If the Trustees determine that the use of the name "Fidelity Mortgage Investors" is not practical, legal or convenient, they may adopt such other name as they shall deem appropriate.

1.2 Location. The principal office of the Trust in Massachusetts shall be in Boston, Massachusetts, unless changed by the Trustees to another location in Massachusetts. The Trust shall have such other offices or places of business as the Trustees may from time to time determine.

1.3 Nature of Trust. The Trust shall be of the type commonly termed a Massachusetts business trust and shall not be a partnership, general or limited, joint venture, joint stock company, association or corporation. The Shareholders shall be beneficiaries and their relationship to the Trustees shall be solely in that capacity in accordance with the rights conferred upon them hereunder. Neither the Trustees nor the Shareholders, nor any of them, shall for any purpose be deemed to be, partners or members of an association.

1.4 Purpose. The principal purpose or business of the Trust shall be to invest the assets of the Trust in notes, bond or other obligations secured by Mortgages on Real Property or rights or interests in Real Property. The Trust may engage in other business and commercial activities related to the Trust's principal business, including investment on a secured or unsecured basis in all types of property and securities, real, personal or mixed, tangible or intangible, as the Trustees may deem advisable and the Trustees' determination that such activities are related to the Trust's principal business shall be conclusive for all purposes. The Trustees may, but shall not be required to, cause the Trust to be operated in a manner to qualify the Trust as a "real estate investment trust" as defined in Section 856 of the Internal Revenue Code of 1954.

ARTICLE II

Trustees

2.1 Number, Term of Office, Qualification and Compensation of Trustees. There shall be not less than three (3) nor more than eleven (11) Trustees. The initial Trustees shall be the three (3) signatories to the Declaration as originally filed on May 29, 1969. The number of Trustees may be increased or decreased from time to time by the

Trustees in the manner stated in the Trustees' Regulations. The term of office of each Trustee shall be one (1) year and until the election and qualification of his successor. Trustees shall be elected at the annual meeting of Shareholders by a majority of the votes cast at such meeting. Trustees may succeed themselves in office. Trustees shall be individuals who are at least 21 years old and not under legal disability and at least a majority shall be citizens of the United States of America. No Person shall qualify as a Trustee until he shall have either signed this Declaration or agreed in writing to be bound by this Declaration. No Trustee shall be required to give bond, surety or security to secure the performance of his duties or obligations hereunder. The Trustees shall receive such fee for their services as they shall deem reasonable and proper and shall be entitled to receive additional remuneration for services rendered to the Trust in any other capacity, including, without limitation, legal, accounting, brokerage, underwriting or other professional services or as an officer or employee of the Trust.

2.2 Resignation, Removal and Death. A Trustee may resign at any time by giving written notice thereof in recordable form to the other Trustees at the principal office of the Trust. The acceptance of a resignation shall not be necessary to make it effective. A Trustee may be removed with or without cause by the vote of a majority of the outstanding Shares or with cause by the vote of a majority of the Trustees. Upon the resignation or removal of any Trustee, he shall execute and deliver such documents and render such accounting as the remaining Trustees shall require and shall thereupon be discharged as Trustee. Upon the incapacity or death of any Trustee, his legal representative shall perform the acts set forth in the preceding sentence.

2.3 Vacancies. The resignation, removal, incompetency

or death of any or all of the Trustees shall not terminate the Trust or affect its continuity. During a vacancy, the remaining Trustee or Trustees (even though less than three (3) may exercise the powers of the Trustees hereunder. Vacancies among the Trustees (including vacancies resulting from an increase in the number of Trustees) may be filled by a written designation signed by a majority of the remaining Trustees. Appointments shall take effect upon the qualification of the appointee, and shall be for a term continuing until the next annual election of Trustees and until the election or appointment and qualification of a successor in accordance with this Declaration.

2.4 Successor Trustees. The right, title and interest of the Trustees in and to the Trust Estate shall vest automatically in all persons who may hereafter become Trustees upon their due election or appointment and qualification without any further act, and thereupon, they shall have the same rights, privileges, powers, duties and immunities as though originally named as Trustees in this Declaration. Appropriate written evidence of the election or appointment and qualification of successor Trustees shall be filed with the records of the Trust and in such other offices or places as the Trustees may deem necessary, appropriate or desirable. Upon the resignation, removal or death of a Trustee he (and in the event of his death, his estate) shall automatically cease to have any right, title or interest in or to any of the Trust Estate, and the right, title and interest of such Trustee in and to theTrust Estate shall vest automatically in the remaining Trustees without any further act.

A certificate or other written instrument signed by a majority of the Trustees stating who at any time are or were Trustees shall constitute *prima facie* proof of the matters set forth therein.

2.5 Actions by Trustees. The Trustees may act with or without a meeting. Except as otherwise provided herein, any action of a majority of Trustees present at a duly convened meeting of the Trustees shall be conclusive and binding as an action of the Trustees. A quorum for meetings of Trustees shall be a majority of all of the Trustees in office. Action may be taken without a meeting by the written consent of a majority of the Trustees. Any action or actions permitted to be taken by the Trustees may be taken pursuant to authorization granted at a meeting of the Trustees conducted by a telephone conference call. The minutes of any Trustees' meeting shall be prepared in the same manner as a meeting of the Trustees held in person. Any action taken by the Trustees in accordance with the provisions of this paragraph 2.5 shall be conclusive and binding upon the Trust, upon the Trustees and upon the Shareholders, as an action of all the Trustees, collectively, and of the Trust.

ARTICLE III

Trustees' Powers

3.1 General Power of Trustees. The Trustees shall have, without other or further authorization, full, absolute and exclusive power, control and authority over the Trust Estate and of the business and affairs of the Trust, free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right, subject only to the limitations contained in this Declaration. The Trustees may do and perform such acts and things as in their sole judgment and discretion are necessary and proper for carrying out the

purposes of the Trust or conducting its business and affairs. The enumeration of specific powers shall not be construed as limiting the exercise of general powers or any other specific power. Such powers of the Trustees may be exercised without order of or resort to any court.

3.2 Specific Powers. Without restricting or limiting the general powers granted in the preceding paragraph, the powers of the Trustees shall include, among others, the following (subject always to the limitations and restrictions stated elsewhere in this Declaration):

(a) To retain, invest and reinvest the capital and funds of the Trust in any property, real, personal or otherwise, tangible or intangible, whether or not such property is authorized by law for investment by trust funds.

(b) To invest in, purchase or acquire for cash, other property or, through the issuance of its Shares, notes, debentures, bonds or other obligations, any notes, bonds or other obligations which are secured by Mortgage Loans (or any interest therein) and, in connection therewith, receive a participation in any rents, lease payments, gross income, profits, equity or ownership of Real Property securing such Mortgages; to invest in loans secured by the pledge or transfer of Mortgage Loans; and to develop, operate, pool, unitize, grant production payments out of, lease or otherwise dispose of mineral, oil and gas properties and rights.

(c) To purchase, acquire, own, hold, manage, improve, lease (for a term extending beyond the possible termination of the Trust or for a lesser term), option, grant, sell, exchange, dispose of, encumber, mortgage (with or without power of sale), partition, surrender, release or otherwise deal in and with Real Property and assets, real or personal; and to erect, construct, alter, repair, demolish or

otherwise physically affect any buildings, structures or improvements situated on or comprising any real property interests owned or to be owned by the Trust.

(d) To sell, rent, exchange, assign, mortgage, pledge, grant security interests in, convey, transfer or otherwise dispose of any and all of the Trust Estate by deeds, trust deeds, assignments, bills of sale, leases, mortgages, financing statements, security agreements and other instruments, whether the term thereof extends beyond the term of office of the Trustees and beyond the possible termination of the Trust or for a lesser term.

(e) To issue shares, bonds, debentures, notes or other evidences of indebtedness, which may be secured, unsecured, subordinated to other indebtedness of the Trust or convertible into Shares and which may include options, warrants and rights to subscribe to, purchase or acquire Shares to such Persons for such cash, property or other consideration (including Securities of any other Person) on such terms as the Trustees may deem advisable and list any of the foregoing Securities issued by the Trust on any securities exchange and to purchase or otherwise acquire, hold, cancel, reissue, sell and transfer any of such Securities.

(f) To borrow money and give negotiable or non-negotiable instruments therefor; to guarantee, indemnify or act as surety with respect to payment or performance of obligations of third parties; and to assign, convey, transfer, mortgage, subordinate, pledge, grant security interests in, encumber or hypothecate the Trust Estate to secure any of the foregoing.

(g) To lend money, whether secured or unsecured.

(h) To create reserve funds for any purpose.

(i) To incur and pay out of the Trust Estate any charges

or expenses and disburse any funds of the Trust, which charges, expenses or disbursements are, in the opinion of the Trustees, necessary or proper for carrying out the purposes of the Trust or conducting its business and affairs.

(j) To deposit funds of the Trust in banks, trust companies, savings and loan associations and other depositories, whether or not such deposits will draw interest.

(k) To possess and exercise all the rights, powers and privileges incident to the ownership of Mortgage Loans or Securities issued or created by, or interests in, any Person forming part of the Trust Estate to the same extent that an individual might.

(l) To organize or assist in organizing any Person under the laws of any jurisdiction to acquire all or any part of the Trust Estate or to carry on any business in which the Trust shall directly or indirectly have any interest, and to sell, lease, convey, assign, exchange or transfer the Trust Estate, or any part thereof, to any such Person in exchange for the Securities thereof and to lend money to, subscribe for the Securities of or enter into any contracts with any such Person.

(m) To enter into joint ventures, general or limited partnerships and any other lawful combinations or associations.

(n) To create or appoint an Executive Committee from among their number consisting of three (3) members and which shall have such powers, duties and obligations as the Trustees shall deem necessary and proper, including, without limitation, the power to conduct the business and affairs of the Trust during the interim between meetings of the Trustees; provided, however, that such Executive

Committee shall not have the authority to amend this Declaration or alter or modify the Trust's investment objectives.

(o) To elect officers for the Trust (including a Chairman of the Board, President, Secretary, Treasurer and such Vice Presidents as the Trustees may determine) who may be removed or discharged at the discretion of the Trustees, such officers to have such powers and duties and to serve such terms as the Trustees shall determine; to engage or employ any Persons (including any Trustee or officer and any Person who is directly or indirectly controlled by any Trustee or officer) as agents, representatives, employees or independent contractors (including, without limitation, real estate advisors, investment advisors, transfer agents, registrars, underwriters, accountants, attorneys, real estate agents, managers, appraisers, brokers, architects, engineers, construction managers, general contractors or otherwise) in one or more capacities, and to pay compensation from the Trust for services in as many capacities as such Person may be so engaged or employed; and, except as prohibited or limited by law, to delegate any of the powers and duties of the Trustees to any one or more Trustees, the Executive Committee, agents, representatives, officers, employees, independent contractors or other Persons.

(p) To allocate all receipts, moneys or property between income and capital; to amortize any premium or discount; to apportion any profit resulting from the maturity or sale of any asset or the sales price thereof, between income or capital; to determine in what manner expenses or disbursements are to be borne as between income and capital; to apportion any dividend or other distribution on any investment as income or capital and to

provide reserves for depreciation, amortization or obsolescence in respect of the Trust Estate.

(q) To determine from time to time the value of the Trust Estate and of any services, Securities, property or other consideration to be furnished to or acquired by the Trust, and from time to time to revalue the Trust Estate in accordance with such appraisals as the Trustees shall determine.

(r) To collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon or adjust, any actions, suits, claims, demands or other litigation relating to the Trust, the Trust Estate or the Trust's affairs.

(s) To renew, modify, release, compromise, extend, consolidate or cancel, in whole or in part, any obligation to or of the Trust.

(t) To procure insurance policies insuring the Trust Estate against any and all risks and insuring the Trust and/or any or all of the Trustees, the Shareholders or officers against any and all claims and liabilities of any sort arising out of any act or failure to act of the Trust, the Trustees, the Shareholders or the officers.

(u) To cause legal title to the Trust Estate to be held in the name of the Trustees or, except as prohibited by law, in the name of the Trust or one or more of the Trustees or any Person or nominee designated by the Trustees, on such terms, in such manner, with such powers as the Trustees shall determine and with or without disclosure that the Trust or the Trustees are interested therein.

(v) To determine the fiscal year of the Trust and the method or form in which its accounts shall be kept and, from time to time, to change the fiscal year or method or form of accounts.

(w) To adopt and use a seal (but the use of a seal shall not be required for the execution of instruments or obligations of the Trust).

(x) To pay all taxes and assessments, of whatever kind or nature, imposed upon or against the Trust Estate, or any part thereof, or upon or against any Trustee, in connection with the activities, affairs or business of the Trust, and in that connection to make such returns, claims for refund, or agreements, and to do such other acts or things, as may be deemed necessary, appropriate or desirable by the Trustees.

(y) To adopt and amend Trustees' Regulations which may include, subject to the terms of this Declaration, provisions relating to meetings of the Trustees and of the Shareholders; matters relating to voting and the use of proxies; the election or appointment of officers, employees, representatives and agents; the form of Shares and the conditions for replacing lost, mutilated or stolen certificates; and the procedures for amendment of Trustees' Regulations.

(z) To exercise with respect to property of the Trust, all options, privileges and rights, whether to vote, assent, subscribe or convert the same; to grant proxies and to participate in and accept Securities issued under any voting trust agreement.

(aa) To purchase, acquire through the issuance, sale or exchange of shares, merge or consolidate with, or invest in other real estate investment trusts or Persons.

3.3 Additional Powers. The Trustees shall have power to do all such things and execute all such instruments as they deem necessary, proper or desirable in order to carry out, promote or advance the purposes of this Trust although such matters or things are not herein specifically mentioned. Any

determination of the purposes of the Trust made by the Trustees in good faith shall be conclusive. In construing the provisions of this Declaration, the presumption shall be in favor of the grant of power to the Trustees.

ARTICLE IV

Manager; Limitation on Operating Expenses

4.1 Employment of Manager. The Trustees are responsible for the general policies of the Trust and for such general supervision of the business of the Trust conducted by officers, agents, employees, investment advisers or independent contractors of the Trust as may be necessary to insure that such business conforms to the provisions of this Declaration. However, the Trustees are not required personally to conduct the business of the Trust and, consistent with their ultimate responsibility as stated herein, the Trustees shall have power to appoint, employ or contract with any such natural or legal Person or Persons (including one or more of themselves and any corporation, partnership or trust in which one or more of them may be directors, officers, stockholders, partners or trustees) as the Trustees may deem necessary or desirable for the transaction of the business of the Trust. The Trustees may, therefore, employ or contract with a corporation, partnership, trust or individual (herein referred to as the "Manager"), and the Trustees may grant or delegate such authority to the Manager as the Trustees may, in their sole discretion, deem necessary or desirable, without regard to whether such authority is normally granted or delegated by trustees.

The Trustees shall have the power to determine the terms of compensation of the Manager or any other such Person or

Persons whom they may employ or with whom they may contract; provided, however, that any determination to appoint, employ, or contract with any Trustee or any entity with which a Trustee is affiliated by reason of a managerial or ownership interest, shall be valid only if made, approved or ratified, after disclosure of such relationship, by a majority of the Trustees not so affiliated. The Trustees may exercise broad discretion in allowing the Manager to administer and regulate the operations of the Trust, to act as agent for the Trust, to execute documents on behalf of the Trustees, and to make executive decisions which conform to general policies and general principles previously established by the Trustees.

4.2 Term. The Trustees shall not enter into any contract with the Manager unless such contract has an initial term of no more than one (1) year and provides for annual renewal or extension thereafter, except that the first contract with the Manager entered into by the Trustees may have an initial term not exceeding two (2) years. Any such contract with the Manager shall be terminable with or without cause upon 60 days notice to the Manager by the Trustees. The Trustees shall not enter into such a contract with any Person in which a Trustee is a director, officer, employee, stockholder or partner unless such contract provides for renewal or extension thereof by the affirmative vote of a majority of the other Trustees. Each renewal or extension of any such contract must be executed not less than six (6) months nor more than eight (8) months prior to the expiration of the then current term.

4.3 Relationship of Trustees to Manager. Not more than forty-nine percent (49%) of the total number of Trustees may be directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any

person who is affiliated with the Manager; provided, however, that if at any time the percentage of Trustees who are directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any person who is affiliated with the Manager becomes, by reason of vacancies, more than forty-nine percent (49%) of the total number of Trustees then in office, then, within sixty (60) days of such occurrence, the continuing Trustees or Trustee shall appoint a sufficient number of Trustees so that there is again not more than forty-nine percent (49%) of the total number of Trustees then in office who are directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any person who is affiliated with the Manager.

4.4 Restrictions on Manager. The Manager may administer the Trust as its sole and exclusive function or engage in other activities, including the rendering of advice to other investors and the management of other investments. The Trustees may request the Manager to engage in certain other activities which complement the Trust's investments.

The Manager shall not, without the prior written consent of a majority of the Trustees, invest in nor render advice or service to any Person other than the Trust in connection with any investment in Development Loans, Construction Loans or other Mortgage Loans or interests in Real Property of a type which the Trustees may have subsequently declared to be a principal investment objective of the Trust, except that the Manager may, with respect to any loan or other investment in which the Trust may participate or allot a participation, render advice and service, with or without remuneration, to each and every participant in such loan or other investment.

4.5 Limitation on Operating Expenses. The Operating

Expenses of the Trust, including any fees or expenses payable to the Manager, shall not exceed an amount equal to one and one-half percent (1 1/2%) of the Net Assets of the Trust, and each contract made with the Manager shall provide for a refund to the Trust of the amount, if any, by which the Operating Expenses exceed said amount.

ARTICLE V

Investment Policy

5.1 Permitted Investments. The Trustees shall invest the Trust Estate in Real Property and the ownership of any interests in Real Property, Securities of Persons involved in owning, operating, leasing, developing, financing or dealing in Real Property, publicly-held Securities and Mortgage Loans of all kinds, including, without limitation, intermediate and long-term Mortgages, Construction Loans, Development Loans, Loans on unimproved Real Property, First Mortgage Loans, Junior Mortgage Loans, Wrap-Around Loans, Standby Commitments, Gap Commitments, sale and leasebacks, land purchase leasebacks, net lease financings, purchase and installment salebacks, high credit lease-secured Mortgages, convertible Mortgages, Mortgages of special interests in Real Property, including, without limitation, leaseholds, air rights and condominiums, and any other Real Property financing techniques which might be developed in the future. The Trustees are authorized to make commitments to make investments consistent with the foregoing policies.

Subject to the investment restrictions contained in paragraph 5.3, the Trustees may determine and establish what

proportion of the Trust Estate may be invested in any investments permitted by this Article, may establish standards and guidelines to be followed in making all such investments, and may amend or alter any or all investment policies, standards and guidelines of the Trust if, in their judgment, such change would be in the best interests of the Trust. The failure of the Trustees to invest the Trust Estate in accordance with this Article shall not affect the validity of any investment made or action taken by the Trustees.

The Trustees may, but shall not be required to, make investments in such a manner as to comply with the requirements of the REIT Provisions with respect to the composition of the Trust's investments and the derivation of its income; provided, however, that no Trustee, officer, employee or agent of the Trust shall be liable for any act or omission resulting in the loss of tax benefits under the Internal Revenue Code except for that arising from his own bad faith, willful misconduct, gross negligence or reckless disregard of his duties or for his failure to act in good faith in the reasonable belief that his action was in the best interests of the Trust.

5.2 Uninvested Assets. To the extent that the Trust has assets not otherwise invested in accordance with paragraph 5.1, the Trustees may invest such assets in:

(a) obligations of, or obligations guaranteed by, the United States Government or any agencies or political subdivisions thereof;

(b) obligations of, or obligations guaranteed by, any state, territory or possession of the United States of America, or any agencies or political subdivisions thereof;

(c) evidences of deposits in, or obligations of, banking institutions, state and federal savings and loan associ-

ations and savings institutions which are members of the Federal Deposit Insurance Corporation or of the Federal Home Loan Bank System; and,

(d) shares of other real estate investment trusts, to the extent permitted by the REIT Provisions, which do not, to the actual knowledge of the Trustees, hold investments or engage in activities prohibited to the Trustees under paragraph 5.3.

(e) subject to the restrictions of paragraph 5.3, any other type of property, real, personal or mixed, tangible or intangible.

5.3 Restrictions. The Trustees shall not:

(a) invest more than 10% of the Total Assets of the Trust in unimproved Real Property or Mortgage Loans secured by Mortgages on unimproved Real Property; provided, however, that there shall be excluded from any computation made with respect to this paragraph 5.3(a) unimproved Real Property which is then in the process of development or which will be developed within a reasonable period following the date as of which such computation is made;

(b) invest more than 10% of the Total Assets of the Trust in obligations secured by Junior Mortgages, excluding Wrap-Around Loans and any Mortgage Loan to the extent made or acquired against a commitment from a recognized institutional lender for an intermediate or long-term Mortgage Loan;

(c) issue equity securities of more than one class (other than convertible obligations, warrants, rights and options) or issue 'redeemable securities' as defined in Section 2(a)(31) of the Investment Company Act of 1940;

(d) invest in real estate contracts for sale (except under

circumstances wherein the investment of the Trust is substantially equivalent to a mortgagee's interest) in excess of a value of 1% of the Total Assets of the Trust; provided, however, that nothing in this paragraph 5.3(d) shall prevent the holding of such contracts of sale as security for loans made by the Trust and the ownership of such contracts of sale upon foreclosure of, or realization upon, such security interest, and contracts of sale so held or owned shall be excluded from the computation required by this paragraph 5.3(d);

(e) engage in the business of underwriting or agency distribution of securities issued by others, but this prohibition shall not prevent the Trust from selling participations in Mortgage Loans or interests in Real Property; and

(f) invest in commodities or engage in any short sale.

5.4 Obligor's Default. Notwithstanding any provision in any Article of this Declaration of Trust, when an obligor to the Trust is in default under the terms of any obligation to the Trust (or, in the good faith judgment of the Trustees, there is a substantial risk that such a default may occur), the Trustees shall have the power to take any action and to pursue any remedies permitted by law which, in their sole judgment, are in the interest of the Trust, and the Trustees shall have the power to hold property of a type and in an amount not permitted hereunder and to enter into any desirable investment, commitment or obligation of the Trust resulting from the pursuit of such action or remedies or necessary or desirable to dispose of property acquired in the pursuit of such action or remedies.

ARTICLE VI

The Shares and Shareholders

6.1 Shares. The interest of the beneficiaries in the Trust shall be divided into Shares, all of one (1) class and with a par value of One Dollar ($1.00) per share. The Shares shall be personal property. The certificates evidencing the Shares shall be in such form and signed (manually or by facsimile) on behalf of the Trust in such manner as the Trustees shall determine. The certificates shall be negotiable and title thereto shall be transferred by assignment and delivery in all respects as a stock certificate of a Massachusetts corporation. There shall be no limit upon the number of Shares to be issued. The Shares may be issued for such consideration as the Trustees shall determine. The Trustees may authorize share dividends or share splits. All Shares shall be of the same class and shall have equal dividend, distribution, liquidation and other rights.

Each Shareholder shall be entitled to cast one vote for each Share held for the election of Trustees and on all other matters submitted to the vote of the Shareholders except that Shares reacquired by the Trust shall no longer be deemed outstanding and shall have no voting or other rights unless and until reissued. Shares reacquired by the Trust may be cancelled and restored to the status of authorized and unissued Shares by action of the Trustees. All Shares shall be fully paid and nonassessable by or on behalf of the Trust upon receipt of full consideration for which they have been issued or without additional consideration if issued by way of share dividends or share splits. Shares shall not have cumulative voting rights. No fractional Shares shall be issued.

6.2 Rights of Shareholders. The Shares shall not entitle the holder to preference, preemptive, appraisal, conversion or exchange rights of any kind. The Shareholders shall have no legal right, title or interest in or to the Trust Estate and shall have no right to a partition thereof during the continuance of the Trust. Shareholders shall, however, be the equitable beneficiaries of the Trust, but shall have only the rights provided for in this Declaration and in the Trustees' Regulations. Except with respect to matters in which the Shareholders are specifically given the right to vote by this Declaration, no action taken by the Shareholders at any meeting shall in any way bind the Trustees.

6.3 Shares Deemed Personal Property. The Shares shall be personal property. The death, insolvency or incapacity of a Shareholder during the continuance of the Trust shall not terminate the Trust or give the legal representative of such Shareholder any right to any partition or accounting with respect to the Trust Estate or any income or profits therefrom, or to take any action in the courts or otherwise against other Shareholders or the Trustees or the Trust Estate, but shall simply entitle such legal representative to demand and, subject to any requirements of law, to receive a new certificate representing Shares in place of the certificate held by said Shareholder, upon the receipt of which such legal representative shall succeed to all the rights of the said Shareholder under this Declaration.

6.4 Records, Issuance and Transferability of Shares. Stock records shall be kept by the Trustees, containing the names and addresses of the Shareholders, the number of Shares held by each and the certificate numbers. The issuance and transfer of all Shares shall be recorded in such stock records. The Persons in whose names certificates are registered on such records shall be deemed the absolute

owners of the Shares for all purposes of the Trust; but nothing herein shall preclude the Trustees from inquiring as to the actual ownership of Shares. Until a transfer is duly entered on the records of the Trust, the Trustees shall not be affected by any notice of such transfer, either actual or constructive. The receipt by the Person in whose name any Shares are registered on the records of the Trust or of the duly authorized agent of such Person, or if such Shares are so registered in the names of more than one Person, the receipt of any one of such Persons, or of the duly authorized agent of such Person, shall be a sufficient discharge for all dividends or distributions payable or deliverable in respect of such Shares and from all liability to see to the application thereof.

Shares shall be transferable on the records of the Trust only by the record holder thereof or by his agent thereunto duly authorized in writing upon delivery to the Trustees or a transfer agent of the certificate or certificates therefor, properly endorsed or accompanied by duly executed instruments of transfer and accompanied by all necessary documentary stamps, together with such evidence of the genuineness of each such endorsement, execution or authorization and of other matters as may reasonably be required by the Trustees or such transfer agent. Upon such delivery, the transfer shall be recorded in the records of the Trust and a new certificate for the Shares so transferred shall be issued to the transferee. Any Person entitled to any Shares because of the death of a Shareholder or by operation of law shall receive a new certificate therefor upon delivery to the Trustees or a transfer agent of satisfactory proof of the right of such Person to the receipt of such Shares, the existing certificate for such Shares and all necessary releases from applicable governmental authorities. In case of the loss, mutilation or destruction of any certificate for Shares, the

Trustees may issue or cause to be issued a replacement certificate on such terms and conditions as the Trustees shall determine.

6.5 Dividends or Distributions to Shareholders. The Trustees may from time to time declare and pay to Shareholders, in proportion to their respective ownership of Shares, such dividends or distributions in cash or other property, out of current or accumulated income, capital, capital gains, principal, surplus, or from any other source as the Trustees in their discretion shall determine. Shareholders shall have no right to any dividend or distribution unless and until declared by the Trustees and the determination of the earnings, surplus and profits available therefor shall lie wholly in the discretion of the Trustees. The Trustees shall furnish the Shareholders at the time of each such distribution a statement in writing advising as to the source of the funds so distributed or, if the source thereof has not then been determined, the communication shall so state and in such event, the statement as to such source shall be sent to the Shareholders not later than sixty (60) days after the close of the fiscal year in which the distribution was made.

6.6 Transfer Agent, Dividend Disbursing Agent and Registrar. The Trustees shall have power to employ one or more transfer agents, dividend-disbursing agents and registrars and to authorize them on behalf of the Trust to do and perform such duties and acts as are performed by transfer agents, dividend-disbursing agents and registrars for corporations.

6.7 Shareholders' Meetings. There shall be an annual meeting of the Shareholders at such time and place as the Trustees shall prescribe at which all Trustees shall be elected or re-elected and any other proper business may be

conducted. The annual meeting of Shareholders shall be held after delivery to the Shareholders of the annual report and within six (6) months after the end of each full fiscal year. Special meetings of Shareholders may be called by a majority of the Trustees and shall be called upon the written request of Shareholders holding not less than twenty percent (20%) of the outstanding Shares of the Trust entitled to vote in the manner provided in the Trustees' Regulations. If there shall be no Trustees, the officers of the Trust shall promptly call a special meeting of the Shareholders for the election of successor Trustees. Notice of all meetings shall be given as provided in the Trustees' Regulations and the notice of any special meeting shall state the purposes of the meeting. A majority of the outstanding Shares entitled to vote at any meeting represented in person or by proxy shall constitute a quorum at any such meeting. Whenever any action is to be taken by the Shareholders, it shall, except as otherwise required by this Declaration or by law, be authorized by a majority of the votes cast at a meeting of Shareholders by holders of Shares entitled to vote thereon. The affirmative vote of the holders of a majority of all outstanding Shares shall be required to approve any sale, lease, exchange or other disposition of more than fifty percent (50%) of the Trust Estate, but no such vote or consent shall be required for the sale, lease, exchange or other disposition of less than fifty percent (50%) of the Trust Estate. Any Shareholder action may be taken without a meeting on written consent signed by the holders of a majority of all outstanding Shares entitled to vote thereon, or such larger proportion otherwise required hereunder.

6.8 Proxies. Whenever the vote or consent of Shareholders is required or permitted under this Declaration, such vote or consent may be given either directly by the Shareholder or to a proxy in the form prescribed by the Trustees. The Trustees may solicit such proxies from the Shareholders or any of them in any matter requiring or permitting the Shareholders' vote or consent.

6.9 Reports to Shareholders.

(a) Not later than one hundred twenty (120) days after the close of each fiscal year of the Trust, the Trustees shall mail to the Shareholders an annual report of the business and operations of the Trust during such fiscal year containing a balance sheet and a statement of income and surplus of the Trust. All financial statements shall be certified by a firm of independent certified public accountants or independent public accountants of nationally recognized standing, based on an examination of the books of the Trust not materially limited in scope, and made in accordance with generally accepted accounting procedures.

(b) Not later than sixty (60) days after the close of each of the first three (3) quarters of each fiscal year of the Trust, the Trustees shall submit a balance sheet and a statement of income and surplus and other pertinent information regarding the Trust and its activities during such quarter to the Shareholders, which financial statements shall be certified by the Trustees but need not be audited or certified by independent certified public accountants or independent public accountants.

(c) All reports shall be in such form and contain such items as the Trustees shall determine and shall constitute periodic accountings by the Trustees to the Shareholders.

6.10 Fixing Record Date. The Trustees may fix, in advance, a date as the record date for determining the Shareholders entitled to notice of or to vote at any meeting of Shareholders or to consent to any proposal without a

meeting or for the purpose of determining Shareholders entitled to receive payment of any dividend or distribution (whether before or after termination of the Trust). The record date so fixed shall be not less than ten (10) days nor more than sixty (60) days prior to the date of the meeting or event for the purposes of which it is fixed.

6.11 Sufficiency of Notice. Any notice or other communication to any shareholder shall be deemed duly delivered when deposited, postage prepaid, in the United States mail, addressed to such Shareholder at his address as it appears on the records of the Trust.

6.12 Shareholders' Disclosures; Redemption of Shares. In the event the Trust is operated in a manner to comply with the REIT Provisions, the Shareholders shall, upon demand, disclose to the Trustees in writing such information with respect to direct and indirect ownership of Shares as the Trustees deem necessary to comply with the REIT Provisions, or to comply with the requirements of any other governmental authority. If the Trustees shall, at any time and in good faith, be of the opinion that direct or indirect ownership of Shares of the Trust has or may become concentrated to an extent which is contrary to the requirements of Section 856(a)(5) or (6) of the Internal Revenue Code of 1954, then the Trustees shall have the power (i) to call for redemption a number of such concentrated Shares sufficient, in the opinion of the Trustees, to maintain or bring the direct or indirect ownership of Shares of the Trust into conformity with the requirements of said Section 856(a)(5) or (6) and (ii) to refuse to transfer Shares to any Person whose acquisition of the Shares in question would, in the opinion of the Trustees, result in a violation of said Section 856(a)(5) or (6). The redemption price shall be equal to the fair market value of the Shares as reflected in the

average bid quotation for the Shares (if then traded over-the-counter) or the average closing sale price (if then listed on a national securities exchange) during the 30 business days preceding the day on which notice of redemption is sent, or, if no quotations or closing sale price for the Shares are available, as determined in good faith by the Trustees. From and after the date fixed for redemption by the Trustees, the holder of any Shares so called for redemption shall cease to be entitled to dividends, voting rights and other benefits with respect to such Shares excepting only the right to payment of the redemption price fixed as aforesaid. For the purpose of this paragraph 6.12, the term "individual" shall be construed as provided in Section 542(a)(2) of the Internal Revenue Code of 1954, or any successor provision, and "ownership" of Shares shall be determined as provided in Section 544 of the Internal Revenue Code of 1954.

ARTICLE VII

Liability and Limitation Thereof

7.1 Exculpation. No Trustee or officer of the Trust shall be liable to the Trust, to any Trustee or to any Shareholder for any act or omission of any other Trustee, Shareholder, officer or agent of the Trust or be held to any personal liability whatsoever in tort, contract or otherwise in connection with the affairs of the Trust, except only that arising from his own wilful misfeasance, bad faith, gross negligence or reckless disregard of duty.

7.2 Limitation of Liability. Except as provided in paragraph 7.1, no Trustee, officer or Shareholder shall be subject to personal liability for any debt, claim, demand,

judgment, decree, liability or obligation of any kind of, against or with respect to the Trust, arising out of any action taken or omitted for or on behalf of the Trust and the Trust shall be solely liable therefor and resort shall be had solely to the Trust Estate for the payment or performance thereof. The Trustees and officers, in incurring any debt, liability, or obligation, or in taking or omitting any other action, for or in connection with the Trust are and shall be deemed to be acting as Trustees or officers and not in their individual capacities. The Trustees shall use every reasonable means to assure that all persons having dealings with the Trust shall be informed that the private property of the Shareholders and the Trustees shall not be subject to claims against and obligations of the Trust to any extent whatever. The Trustees shall cause to be inserted in every written agreement, undertaking or obligation made or issued on behalf of the Trust (including the Shares), an appropriate provision to the effect that the Shareholders and the Trustees shall not be personally liable thereunder, and that all parties concerned shall look solely to the Trust Property for the satisfaction of any claim thereunder, and appropriate reference shall be made to this Declaration. The omission of such a provision from any such agreement, undertaking or obligation, or the failure to use any other means of giving such notice, shall not, however, render the Shareholders or the Trustees personally liable. Each Shareholder shall be entitled to indemnity from the Trust Estate if, contrary to the provisions hereof, such Shareholder shall be held to any personal liability. The Trustees shall, at all times, maintain insurance against possible liability on the part of the Trust, *ex delicto,* in such amounts and against such other risks as the Trustees shall deem adequate to protect the Trust Estate, Shareholders, Trustees, officers and agents.

7.3 Indemnification and Reimbursement of Trustees and Officers. Any Trustee, officer or Shareholder shall be indemnified and held harmless by the Trust against judgments, fines, amounts paid on account thereof (whether in settlement or otherwise) and reasonable expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense of any action, suit, proceeding, claim or alleged liability asserted by reason of the fact that he or his testator was or is a Trustee, officer or Shareholder or in connection with any appeal therein, whether or not the same proceeds to judgment or is settled or otherwise brought to a conclusion; provided, however, that no such Person shall be indemnified or reimbursed if such claim, obligation or liability arose out of the Trustee's, officer's or Shareholder's wilful misfeasance, bad faith, gross negligence or reckless disregard of duty; and provided further, that such Person gives prompt notice thereof and takes such action as will permit the the Trust to conduct the defense thereof. Such rights of indemnification and reimbursement shall be satisfied only out of the Trust Estate.

7.4 Transactions Between Trustees and Trust

(a) Any Trustee or officer may acquire, own, hold and dispose of Shares in the Trust for his individual account and may exercise all rights as a Shareholder. Any Trustee or officer may have personal business interests and may engage in personal business activities, provided the same do not directly compete with the actual business being conducted by the Trust. Subject to the provisions of this Declaration, any Trustee or officer may have a direct or indirect interest in a Person who renders advice or services to the Trust and may receive compensation from such Person as well as compensation as Trustee, officer or

otherwise hereunder. None of these activities shall be deemed to conflict with his duties and powers as Trustee or officer.

(b) Subject to the provisions of paragraph 7.4(a), the Trustees may not, directly or indirectly, purchase or otherwise acquire any property whatsoever from, or sell or otherwise transfer any property whatsoever to, any Trustee in his individual capacity, or any officer, employee, investment advisor, manager, or independent contractor of the Trust. Nor may the Trustees lend any of the assets or property of the Trust to any Trustee, in his individual capacity, or any officer or employee of the Trust. For the purposes of this section, the term "independent contractor" means an "independent contractor" as defined in Section 856(d)(3) of the Internal Revenue Code of 1954, which furnishes or renders services to tenants of, or manages or operates, Real Property owned by the Trust.

(c) The Trustees shall not knowingly, directly or indirectly purchase or otherwise acquire any property whatsoever from, or sell or otherwise transfer any property whatsoever to, or lend any of the assets or property of the Trust to, the Manager, any Person affiliated with the Manager or any other Person with which a Trustee, in his individual capacity, is affiliated by reason of being a director, officer, partner, trustee, venturer or holder of more than one-half (1/2) of one percent (1%) of the outstanding capital stock of or other interest in such other Person, unless (i) such transaction has been approved or ratified by the affirmative vote of a majority of the Trustees, including a majority of the Trustees not so affiliated and to whom the interest or connection with such transaction has been disclosed or was known; (ii) the

terms of such transaction are fair and reasonable to the Shareholders of the Trust at the time of such transaction and under the circumstances then prevailing; and (iii) such transaction relates to (A) the acquisition of Mortgage Loans on terms not less favorable to the Trust than similar transactions involving unaffiliated parties or (B) the acquisition by the Trust of other property at prices not exceeding the fair value thereof as determined by independent Appraisal or the disposition of Trust property at not less than the fair value thereof as determined by independent Appraisal; and (iv) such transaction relates to the purchase or acquisition of Mortgage Loans or other property from or the sale or disposition of Mortgage Loans or other property to a proposed real estate investment trust to be managed by a Person affiliated with the Manager, which real estate investment trust shall have as its principal investment objective the acquisition, ownership and disposition of real estate equities and other interests in real property (the "Equity Trust"). For purposes of the immediately preceding sentence a Person shall be deemed to be affiliated with the Manager if such Person, or any officer, director, partner, trustee or holder of more than one-half (1/2) of one per cent (1%) of the capital stock of such Person, is an officer, director, partner or holder of more than one-half (1/2) of one percent (1%) of the capital stock of the Manager.

(d) The prohibitions set forth above shall not affect the right of the Trust to acquire participations in First Mortgage Loans on terms not less favorable than those at which such participations are sold to any Person not affiliated with the Trust, as the term affiliated is defined in subparagraph (c) above, nor shall this prohibition affect

the right of the Trust to sell participations in First Mortgage Loans on terms no more favorable than those at which the Trust participates.

(e) This paragraph 7.4 shall not prevent the sale to a Trustee of Shares, notes, bonds, debentures or other Securities issued by the Trust for the public offering thereof in accordance with a Registration Statement filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended, nor shall it prevent the payment to a Trustee of commissions or fees for the so-called "private placement" of such Securities with investors. Nothing herein shall prevent the Trustees from forming a corporation, partnership, trust or other business association owned by the Trustees or by their nominees for the purpose of holding title to property of the Trust or managing property of the Trust.

(f) The Trustees and the Manager are authorized to execute such agreements with the Equity Trust and its advisor as shall, among other things provide as follows:

(i) Any investments or investment opportunities which fall within the principal investment objective of the Trust and within the investment policies adopted from time to time by the Trustees and which are presented to the Manager or any Person affiliated with the Manager (including the advisor to the Equity Trust), shall first be presented to the Trust for acceptance or rejection by the Trustees and no such investment shall be acquired by the Manager or any Person affiliated with the Manager or presented by any of the foregoing to any Person until after a majority of the Trustees, including a majority of the Trustees who are neither personally interested or affiliated with such advisor, have rejected such investment. Any investments or

investment opportunities which fall within the principal investment objective of the Equity Trust and within the investment policies adopted from time to time by the Trustees of the Equity Trust and which are presented to the Manager or any Person affiliated with the Manager, shall first be presented to the Equity Trust for acceptance or rejection by the Trustees of the Equity Trust and no such investment shall be acquired by the Trust, the Manager or any Person affiliated with the Manager until after a majority of the Trustees of the Equity Trust, including a majority of such Trustees who are neither personally interested or affiliated with the Manager, have rejected such investment.

(ii) In the event that any investment or investment opportunity falls within the principal investment objectives of both the Trust and the Equity Trust (herein collectively called the "Trusts") and within the investment policies adopted by the Trustees of both Trusts, the same shall be offered to both Trusts for acceptance or rejection by a majority of the Trustees, including a majority of the Trustees of each Trust who are not affiliated with the other Trust or the advisor or manager of either Trust ("Independent Trustees"). In the event the Independent Trustees of each Trust approve such investment or a participation therein, each Trust shall participate in such investment in such amounts and on such terms and conditions as the Independent Trustees shall find to be fair and reasonable and in the best interests of their respective Shareholders. If the Independent Trustees of each Trust are unable to agree on the amount of their participation in such investment, the fraction of such investment to be allocated to each Trust shall be

determined by dividing the Common Assets of such Trust by the sum of the Common Assets of each Trust. The term "Common Assets" shall mean the Book Value of that portion of the Total Assets of each Trust comprising the type represented by such proposed investment. The term "Book Value" shall mean the value of an asset on the books of such Trust before provision for amortization, depreciation or depletion and before deducting any indebtedness or other liability or reserve in respect thereof. Funded and unfunded Commitments to make Mortgage Loans shall be included at the lesser of fair market value (in the judgment of the Trustees of such Trust) or cost.

(ii) For purposes of this subparagraph (f), a Person shall be deemed to be affiliated with the Manager, or the advisor of the Equity Trust, if such Person, or any officer, director, partner, trustee or holder of more than one-half (1/2) of one per cent (1%) of the capital stock of such Person, is an officer, director, partner or holder of more than one-half (1/2) of one percent (1%) of the capital stock of the Manager, or the advisor of the Equity Trust, as the case may be.

(v) The authority granted in this subparagraph (f) shall expire and be of no further force and effect upon the failure of the initial registration statement (to be filed by the Equity Trust with the securities and Exchange Commission) to become effective in accordance with the Securities Act of 1933.

7.5 Restriction of Duties and Liabilities. To the extent that the nature of this Trust will permit, the duties and liabilities of Trustees and officers shall be the same as the duties and liabilities of directors and officers of a Massachusetts corporation.

7.6 Persons Dealing With Trustees or Officers. Any act of the Trustees or officers purporting to be done in their capacity as such shall, as to any persons dealing with such Trustees or officers, be conclusively deemed to be within the purposes of the Trust and within the powers of the Trustees and officers. No Person dealing with the Trustees or the authorized officers, agents or representatives of the Trust shall be bound to see to the application of any funds or property passing into their hands or control. The receipt of the Trustees or any of them or of authorized officers, agents or representatives of the Trust for moneys or other consideration shall be binding upon the Trust.

ARTICLE VIII

Duration, Amendment, Termination and Qualification of Trust

8.1 Earlier Termination. Subject to possible earlier Termination in accordance with the provisions hereof, the Trust shall terminate upon the expiration of twenty (20) years after the death of the last survivor of the following named persons:

Name	Child of	Address	Birth Date
Brian Charles Barren	Daniel James Barren	164 Dodds Lane Princeton, N.J.	11/8/63
Emilie Rogerson Cox	Charles W. Cox	47 Crescent Place Short Hills, N.J.	8/6/65
Thomas Lyon Cox	Charles W. Cox	47 Crescent Place Short Hills, N.J.	12/16/66
Elizabeth Chambers Kellogg	James C. Kellogg	1 Essex Road Summit, N.J.	2/1/69
Robin Adair Milam	Arthur W. Milam	1550 Lancaster Terrace Jacksonville, Florida	12/21/54
Kristen Lee Morrell	Hugh Morrell	44 Old Oak Drive Summit, N.J.	7/19/63

Lisa Ann Schroeder	Frederick D. Schroeder	8 Peter Cooper Road New York, N.Y.	7/10/63
David John Strupp, Jr.	David J. Strupp	Holly Lane Rye, N.Y.	1/20/69
Karen Elizabeth Wickersham	Ralph Wickersham	4603 Queen Lane Jacksonville, Florida	10/25/64
Amy Lynn Goetz	Donald L. Goetz	3602 Leewood Lane Jacksonville, Florida	5/9/69

8.2 Termination of Trust. The Trust may be terminated by the affirmative vote of the holders of a majority of all outstanding Shares entitled to vote thereon at any meeting of Shareholders. Upon the termination of the Trust:

(a) The Trust shall carry on no business except for the purpose of winding up its affairs.

(b) The Trustees shall proceed to wind up the affairs of the Trust and sell, convey, assign, exchange, transfer or otherwise dispose of the Trust Estate on such terms and conditions as they shall determine, pay its liabilities and do all other acts appropriate to liquidate its business; provided that any sale, conveyance, assignment, exchange, transfer or other disposition of more than fifty percent (50%) of the Trust Estate shall require approval of the principal terms of the transaction and the nature and amount of the consideration by vote or consent of the holders of a majority of all the outstanding Shares entitled to vote thereon.

(c) After paying or adequately providing for the payment of all liabilities, and upon receipt of such releases, indemnities and refunding agreements as they deem necessary for their protection, the Trustees shall distribute the remaining Trust Estate, in cash or in kind or partly in each, among the Shareholders according to their respective rights and, upon execution of an instrument setting forth the fact of such termination, the Trustees

shall thereupon be discharged from all further liabilities and duties hereunder and the rights and interests of all Shareholders shall thereupon cease.

8.3 Amendment.

(a) This Declaration may be amended by Shareholders holding a majority of the outstanding Shares entitled to vote thereon (except as to the limitations of the personal liability of Trustees and Shareholders and the prohibition of assessment upon Shareholders). The Trustees may also amend this Declaration without the vote or consent of Shareholders if they deem it necessary to conform this Declaration to the requirments of the REIT Provisions (in the event the Trust is being operated in a manner to comply with the REIT Provisions) or to other applicable federal laws or regulations, but the Trustees shall not be liable for failing so to do.

(b) No amendment may be made, under subparagraph 8.3(a) above, which would change any rights with respect to any outstanding Shares by reducing the amount payable thereon upon liquidation of the Trust or by diminishing or eliminating any voting rights pertaining thereto, or which would amend this sub-paragraph 8.3(b) except with the vote or consent of the holders of two-thirds (2/3) of the outstanding Shares entitled to vote thereon.

(c) Notwithstanding any other provisions hereof, until such time as a Registration Statement under the Securities Act of 1933, as amended, covering the first public offering of Shares of the Trust shall have become effective, the Trust may be terminated or amended in any respect by the Trustees.

(d) No amendment to the Declaration shall become effective until it has been filed in the office of the Secretary of State, Commonwealth of Massachusetts, the office of

the clerk of the city or town in which the Trust at the time has its principal office, and such other places as may be required at the time by Massachusetts law.

8.4 Savings Clause. In the event the Trust is being operated in a manner to comply with the REIT Provisions, the provisions of Section 2.1 and Section 8.3 giving the Shareholders the right to elect Trustees and the right to amend and terminate the Trust shall be subject to the requirements of the REIT Provisions; if any provision granting or limiting such Shareholders' rights shall conflict with the requirements of the REIT Provisions, such provision shall be deemed to be void and without any force or effect *ab initio,* but any action taken pursuant to any such provision shall have been validly taken upon the vote of the Trustees required hereunder. In the event that the provision relating to the election of Trustees by the Shareholders of the Trust shall be deemed to be without force or effect, the Trustees then in office shall be deemed to be the qualified and acting Trustees until such time as the successor Trustees have been named and qualified; provided, however, that at the next meeting of Shareholders after the Trustees shall have notified the Shareholders that any or all of the Shareholders' rights under Section 2.1 or 8.3 created such a conflict and therefore shall be without force and effect, there shall be submitted to the Shareholders for their approval or disapproval by a majority of those voting, the question as to whether such Shareholders' right or rights should be continued.

ARTICLE IX

Definitions

The following terms shall, unless the context otherwise requires, have the respective meanings hereinafter specified when used in this Declaration: In this Declaration, words in the singular number include the plural and in the plural number include the singular.

(a) *Appraisal.* "Appraisal" shall mean the determination of fair market value as of the date of the appraisal of Real Property in its existing state or in a state to be created as determined by the Trustees or by a disinterested person having no economic interest in the Real Property who in the sole judgment of the Trustees or the Manager is properly qualified to make such a determination.

(b) *Construction Loans.* "Construction Loans" shall mean Mortgage Loans incurred to finance all or part of the cost of acquiring and improving land and the construction or improvement of dwellings or other buildings thereon.

(c) *Declaration.* "Declaration" shall mean this Declaration of Trust and all amendments or modifications thereof.

(d) *Development Loans.* "Development Loans" shall mean Mortgage Loans incurred to finance all or part of the cost of acquiring and improving vacant land and developing it into a site or sites suitable for the construction of dwellings and other structures or suitable for other residential, commercial, industrial or public uses.

(e) *First Mortgage Loans.* "First Mortgage Loans" shall mean Mortgages which take priority or precedence over all other charges or encumbrances upon the same Real Property and which must be satisfied before such other charges are entitled to participate in the proceeds of any sale. Such Mortgage may be upon a lessee's interest in Real Property. Such priority shall not be abrogated by

liens for taxes, assessments which are not due or remain payable without penalty, contracts (other than contracts for repayment of borrowed moneys), or leases, mechanics' and materialmen's liens for work performed and materials furnished which are not in default or are in good faith being contested and other claims normally deemed in the same local jurisdiction not to abrogate the priority of a First Mortgage Loan.

(f) *Gap Commitment.* "Gap Commitment" shall mean an undertaking by which a Person agrees to fund the difference between the minimum amount which a permanent lender has agreed to fund and the maximum amount with such permanent lender would fund if certain occupancy or rental requirements are met.

(g) *Manager.* "Manager" shall mean the Person employed by the Trustees under the provisions of Article IV.

(h) *Mortgage Loans.* "Mortgage Loans" shall mean notes, debentures, bonds and other evidences of indebtedness or obligations which are negotiable or non-negotiable and which are secured or collateralized by Mortgages.

(i) *Mortgages.* "Mortgages" shall mean mortgages, deeds of trust or other security deeds on Real Property or rights or interests in Real Property.

(j) *Net Assets.* "Net Assets" shall mean the Total Assets of the Trust without deducting therefrom any liabilities of the Trust except that depreciable assets shall be included therein at the lesser of either (i) the cost of such assets on the books of the Trust less depreciation thereof on a straight-line basis over the useful life of such assets in accordance with generally accepted accounting principles, and in making such calculations the useful life of such assets shall correspond to the useful life used as the basis of depreciation on the Trust's federal income tax returns or (ii) fair market value of such assets in the judgment of the Trustees.

(k) *"Operating Expenses."* "Operating Expenses"

shall mean the aggregate annual Operating Expenses of the Trust in accordance with generally accepted accounting principles, as determined by independent certified public accountants selected by the Trustees, exclusive of the following: the cost of borrowed money; taxes on income and taxes and assessments on real property and all other taxes applicable to the Trust; legal, audit, accounting, underwriting, brokerage, listing, registration and other fees, printing, engraving, advertising and other expenses and taxes incurred in connection with the issuance, distribution, transfer, registration and stock exchange listing of the Trust's securities; fees and expenses paid to Trustees who are not affiliates of the Manager, independent advisers, independent contractors, mortgage servicers (other than the Manager and its affiliates), consultants, managers and other agents employed by or on behalf of the Trust; expenses connected with the acquisition, disposition and ownership of real estate interests or mortgage loans or other property (including the costs and expenses of foreclosure, title insurance and abstract expenses, insurance premiums, legal services, brokerage and sales commissions, maintenance, repair and improvement of property); expenses of owning, operating, maintaining and managing real estate equity interests; expenses (including licenses, fees and commissions) of doing business, both organizationally and operationally, in the various states and other jurisdictions in which the Trust makes investments or otherwise conducts operations; expenses of revising, amending, modifying, or terminating this Declaration of Trust; expenses connected with payments of dividends or interest or distributions in cash or any other form made or caused to be made by the Trustees to holders of securities of the Trust; expenses connected with meetings of Trustees and Shareholders of the Trust, communications to holders of securities of the Trust and advertising, public relations, bookkeeping and clerical expenses incurred in maintaining relations with holders of securities, including

the cost of preparing, printing and mailing certificates for securities, proxy solicitation materials and reports to holders of the Trust's securities; fees and charges of transfer agents, registrars, indenture trustees, warrant agents and depositaries; fees and expenses of independent certified public accountants employed by the Trust to audit the books and records of the Trust, render opinions in connection therewith and perform all other accounting services for the Trust; cost of insurance as required by the Trustees (other than Trustees' liability insurance); provisions for depreciation, depletion, amortization and losses on the disposition of assets and provisions for such losses.

(l) *Person.* "Person" shall mean and include individuals, corporations, limited partnerships, general partnerships, joint stock companies or associations, joint ventures, associations, trusts, banks, trust companies, land trusts, business trusts or other entities and governments and agencies and political subdivisions thereof.

(m) *Real Property.* "Real Property" shall mean and include land, rights in land, leasehold interests (including but not limited to interests of a lessor or lessee therein), and any building, structures, improvements, furnishings, fixtures and equipment located on or used in connection with land, leasehold interests and rights in land or interests therein but does not include Mortgages, Mortgage Loans or interests therein.

(n) *REIT Provisions.* "REIT Provisions" shall mean Part II, Subchapter M of Chapter 1 of Subtitle A of the Internal Revenue Code of 1954 as now enacted or hereafter amended, or successor statutes and the Treasury Regulations from time to time promulgated thereunder.

(o) *Securities.* "Securities" shall mean any stock, shares, voting trust certificates, bonds, debentures, notes or other evidences of indebtedness or, in general, any instruments commonly known as "securities" or any certificates of interest, shares or participations in temporary or interim certificates for, receipts for

guarantees of, or warrants, options or rights to subscribe to, purchase or acquire any of the foregoing.

(p) *Shareholders.* "Shareholders" shall mean, as of any particular time, all holders of record of outstanding Shares at such time.

(a) *Shares.* "Shares" shall mean the shares of beneficial interests of the Trust as described in Article VI.

(r) *Stand-By Commitment.* "Stand-By Commitment" shall mean an undertaking executed at the time of making of a Construction or Development Loan, under which a permanent lender agrees, upon the completion of such construction or development and/or the fulfillment of other conditions, to purchase or provide for the payment of such Construction or Development loans.

(s) *Total Assets of the Trust.* "Total Assets of the Trust" shall mean the value of all of the assets of the Trust Estate as such value appears on the most recent quarterly balance sheet of the Trust available to the Trustees.

(t) *Trust Estate.* "Trust Estate" shall mean, as of any particular time, all or any part of the property, real, personal or otherwise, tangible or intangible, which is transferred, conveyed or paid to or owned by the Trust or the Trustees in their capacities as Trustees hereunder, and all rents, income, profits and gains therefrom and which at such time is owned or held by the Trust or the Trustees in their capacities as Trustees hereunder.

(u) *Trustees' Regulations.* "Trustees' Regulations" shall mean the regulations or by-laws for the conduct of the business and affairs of the Trust adopted by the Trustees concurrently with or immediately after the execution of this Declaration and all amendments or modifications thereto.

(v) *Wrap-Around Loans.* A "Wrap-Around Loan" shall mean a Mortgage Loan under which the Trust is permitted to make the payment of an existing First Mortgage Loan and advances additional funds to the borrower, taking in return a Mortgage Loan secured by a Mortgage in an amount equal to the total unpaid principal

balance of the existing First Mortgage Loan, plus the amount of additional funds actually advanced.

(w) Junior Mortgage Loans. "Junior Mortgage Loans" shall mean Mortgages which (1) have the same priority or precedence over all charges or encumbrances upon Real Property as that required for a First Mortgage Loan except that they are subject to the priority of one or more other Mortgages and (2) which must be satisifed before such other charges or encumbrances (other than prior Mortgages) are entitled to participate in the proceeds of any sale or other disposition of such Real Property.

ARTICLE X

Miscellaneous

10.1 Applicable Law. This trust has been executed by the Trustees in the Commonwealth of Massachusetts to take effect therein and the rights of all parties and the construction and effect of every provision hereof shall be subject to and construed according to the laws of the Commonwealth of Massachusetts.

10.2 Successors in Interest. This Declaration and the Trustees' Regulations shall be binding upon and inure to the benefit of the undersigned Trustees and their successors, assigns, heirs, distributees and legal representatives and every Shareholder and his successors, assigns, heirs, distributees and legal representatives.

10.3 Inspection of Records. Trust records shall be available for inspection by Shareholders at the same time and in the same manner and to the extent that comparable records of a Massachusetts corporation would be available for inspection by shareholders under the laws of the State of Massachusetts. Any federal or state securities administration or other similar authority shall have the right, at

reasonable times during business hours and for proper purposes, to inspect the books and records of the Trust.

10.4 Conflicts with Applicable Law. In the event that the Trust is being operated in a manner to comply with the REIT Provisions, if any provision hereof shall conflict with the REIT Provisions, the same shall be deemed never to have constituted a part of the Declaration; provided, however, none of the remaining provisions of this Declaration and no action taken or omitted prior thereto shall be affected or impaired thereby. A certification signed by a majority of the Trustees setting forth their determination that such conflict exists shall be conclusive evidence of such determination. The Trustees shall not be liable for failure to make any determination. Nothing herein shall limit or affect the right of the Trustees to amend this Declaration as provided elsewhere.

If any provisions of this Declaration shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect or impair any other provision of this Declaration.

10.5 Certifications. Any certificates executed by a Trustee concerning the number or identity of Trustees or Shareholders, that the execution of any instrument or writing has been duly authorized, that any vote at a meeting of the Trustees or Shareholders was duly taken, that the number of Trustees or Shareholders present at any meeting or executing any written instrument satisfies the requirements of this Declaration, concerning the form of any regulation or by-law adopted by or the identity of any officer elected by the Trustees, or concerning the existence or nonexistence of any fact or facts which in any manner relate to the affairs of the Trust shall be conclusive evidence as to the matters so certified in favor of any Person dealing with the Trustees.

10.6 Recording and Filing. A copy of this Declaration

and any amendments shall be filed in the office of the Secretary of State, Commonwealth of Massachusetts, in the office of the City Clerk, Boston, Massachusetts and such other places as shall be required by Massachusetts law. This Declaration and any amendments may also be filed or recorded in such other places as the Trustees deem appropriate.

10.7 Counterparts. This Declaration may be executed in several counterparts, each of which when so executed shall be deemed to be an original, and such counterparts, together, shall constitute but one and the same instrument, which shall be sufficiently evidenced by any such counterpart.

10.8 Headings For Reference Only. Headings preceding the text of the articles and sections hereof have been inserted solely for convenience and reference and shall not be construed to affect the meaning, construction or effect of any provision of this Declaration.

We, Jack H. Quaritius, President and Arthur W. Milam, Secretary of Fidelity Mortgage Investors hereby certify that the above amended and restated Declaration of Trust was approved by unanimous vote of the shareholders of the Trust at a meeting duly called and held on October 20, 1969.

In Witness Whereof, the undersigned have executed this amended and restated Declaration of Trust in Boston, Massachusetts as of October 20, 1969.

/s/ Jack H. Quaritius
/s/ Arthur W. Milam

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK AND JACK H. QUARITIUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JAMES A. ELLIS, JR.
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Attorneys for Respondents

Bowne of Dallas Printed in U.S.A.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W. York, and Jack H. Quaritius respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion. That opinion is reported at 597 F.2d 421.

QUESTION PRESENTED

The Respondents do not agree with Petitioner's statement of the issue presented for review. The only question presented by the case and decided by the Court of Appeals is this:

Whether a district court has original jurisdiction of a civil action wherein the amount in controversy exceeds $10,000 and all the plaintiffs (individuals who are trustees of a business trust asserting specific rights and claims as such) are citizens of states other than that of the sole defendant.

STATEMENT OF THE CASE

The Respondents contend that the following is all that is material to consideration of the petition.

The only plaintiffs were individual citizens of the states other than Texas, and the sole defendant was a Texas corporation with its principal place of business in Texas.

The Plaintiffs were all trustees of Fidelity Mortgage Investors, a Massachusetts business trust, and they brought the action in that capacity. Three of the Plaintiffs were also shareholders in the trust, and they alternatively brought the action as representatives of the shareholders. In addition to diversity jurisdiction, the Plaintiffs contended that the district court had jurisdiction because the matter in controversy arose under the securities laws of the United States.

The Plaintiffs in the complaint alleged that they, as trustees of Fidelity Mortgage Investors, advanced money and became the named payees of an $850,000 promissory note from Rockwall Estates, Inc. in reliance upon a written "takeout commitment" of the Defendant Navarro Savings Association. The complaint further alleged that the Defendant failed to take the Plaintiffs out of their financial position as promised and represented and that damages in excess of $10,000 resulted.

The district court dismissed the complaint for want of jurisdiction. Its opinion indicates that it thought the issue was the citizenship of a business trust that was not even named as a party. The Court of Appeals for the Fifth

Circuit reversed, agreeing with the Plaintiffs that they as trustees were the real parties in interest whose citizenship determined the existence of diversity jurisdiction. While the district court had ruled adversely on Plaintiffs' alternative theories of jurisdiction — that they as representative shareholders under Rule 23.2 were real parties in interest whose citizenship determines jurisdiction, and that there was federal question jurisdiction — the Court of Appeals found it unnecessary to consider them or review the trial court's decision relating to them.

While in its opinion the majority in the Court of Appeals indicated approval of the decision of the Second Circuit regarding citizenship, for diversity jurisdiction purposes, of a limited partnership and suggested an analogy to the business trust here, it kept clear the fact that the trust had not sought to sue and had not sued as an entity. The majority did not purport to determine the citizenship of the trust. It held, merely, that the named individual plaintiffs as trustees are real parties in interest and their difference in citizenship from that of the defendant confers federal jurisdiction.

REASONS FOR DENYING THE WRIT

Respondents (who were plaintiffs in the trial court and refer to themselves sometimes as "plaintiffs") respectfully request that Petitioner (sometimes referred to as "defendant") be denied the Writ of Certiorari for the following reasons:

1. The case does not present the question as asserted by petitioner. No REIT or business trust is a party to the action, the Court of Appeals did not purport to determine the citizenship of the trust, and its citizenship is immaterial. The relevant statute, 28 U.S.C. §1332(a) grants original jurisdiction where the "matter in controversy . . . is between . . . citizens of different states." The controversy,

as set out in the pleadings, is between the plaintiffs (as trustees) and the defendant. The trust, as an entity, is not even alleged to be a party to the controversy, and there was no motion or other suggestion in the trial court that it should be made a party, that the plaintiffs were not real parties to the controversy, or that there was any attempt to create diversity by appointment or removal of trustees.

Under 28 U.S.C. §1332(a) to determine its jurisdiction, the Court must merely determine "the matter in controversy" and whether it "is between citizens of different states." Here, the Court of Appeals determined that the matter in controversy was the transactions whereby the plaintiffs (as trustees) became payees of a note and were not taken out of their position by the defendant. The controversy on its face and actually was between the individual trustees on the one side and the defendant on the other. Petitioner's argument does not even attempt to attack that conclusion.

2. There is no conflict of decisions among the circuits. Petitioner does not cite (and the Respondents have not found) any decision of the Supreme Court or of any court of appeals where complete diversity of citizenship existed between the named parties but where jurisdiction was denied merely because individual parties on one side were asserting legal rights as trustees under a declaration of trust. Rather, the decision below follows a long line of Supreme Court precedents establishing this principle: Where trustees or other fiduciaries are the named parties, and they possess the legal rights and powers to prosecute the action in such a capacity (*i.e.*, they are real parties in interest), it is their citizenship rather than that of the non-party beneficiaries which determines diversity jurisdiction. *See, e.g., The Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford,* 78 U.S. 179 (1870); *Dodge v. Tulleys,* 144 U.S. 451, 455 (1892); *Bullard v. City of Cisco,* 290 U.S. 179, 190 (1933).

Petitioner in its argument cites no conflicting opinions of courts of appeals, and most of the district court decisions it cites are cases in which a business trust was the named party and assertions were made that its fictional citizenship was that of the state of its formation, the state in which its principal place of business was located, the states in which its trustees were citizens, or the states in which its beneficiaries were citizens. Respondents deny that those cases deal with the only issue presented by this case. No court of appeals' decision has been found that conflicts with the decision of the majority in the Fifth Circuit below.

United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) does not control the issues actually presented in this case because here there is no unincorporated association suing or sued, as an entity. *Morrissey v. Commissioner of Internal Revenue,* 296 U.S. 344 (1935) was a tax case and did not relate in any way to diversity jurisdiction except to describe, in general, the nature of a business trust.

3. The Court of Appeals fully considered and correctly decided the material issue. The reasoning by the majority is soundly based on the facts in the case, the Federal Rules of Civil Procedure, and the jurisdictional statute. Even if the majority's analogy to a limited partnership and citation of *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 184 (2nd Cir.) cert. denied, 385 U.S. 817 (1966) should be construed as a holding as to the citizenship for diversity purposes of the business trust (which it is not), nevertheless it is correct despite contrary holdings in other circuits in *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n.,* 554 F.2d 1254 (3rd Cir. 1977), *Riverside Memorial Mausoleum, Inc. v. UMET Trust,* 581 F.2d 62 (3rd Cir. 1978), *Bellview Apartments v. Realty ReFund Trust,* No. 78-1623 (unpublished to date) (4th Cir. August 1979). Since in a diversity action state substantive law governs, when an unincorporated business organization is a named party (which did not occur in the instant case), the Court should

disregard the organization (which has no citizenship) and determine from substantive law and the contracts, charters, trust documents, or other appropriate sources the identity of the individuals who have the right of action or liability — that is, the real parties to the controversy, the real parties in interest — and determine diversity jurisdiction from their citizenship. See Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 250-251 (1978). If FMI had been named as a party in this case, that sound analysis would have produced the same result.

4. There are alternative grounds to support the result in the court of appeals. The Court of Appeals has not reviewed the trial court's rejection of alternative theories of jurisdiction. If it should be held that the beneficial shareholders are the real parties in interest and the trustees are not, three of the plaintiffs are shareholders bringing the action alternatively on behalf of all shareholders under Rule 23.2. Diversity jurisdiction exists even under this alternative determination of the identity of the true parties to the controversy. See, *e.g. Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921). Further, there was asserted federal question jurisdiction. However, as a result of its holding, the Court of Appeals found it unnecessary to determine those issues.

CONCLUSION

The petition does not raise any issue presented by the case. The matter in controversy is between the individual Plaintiffs, who as trustees have the right to assert the claim and are thus the true parties in interest, and the Defendant. The Court of Appeals correctly decided the issue before it.

There is no conflict of decisions or other special or important reason for granting a writ of certiorari. This Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted.

JAMES A. ELLIS, JR.
Attorney of Record for Respondents

CERTIFICATE OF SERVICE

I, James A. Ellis, Jr., a member of the Bar of the Supreme Court of the United States, certify that three copies of the foregoing Respondents' Brief in Opposition have been served upon counsel for Petitioner by United States mail, first class, postage prepaid. I further certify that all parties required to be served have been served.

October 24, 1979.

/s/ James A. Ellis, Jr.

James A. Ellis, Jr.

IN THE

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Respondents.

PETITIONER'S BRIEF ON THE MERITS

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Respondents.

PETITIONER'S BRIEF ON THE MERITS

REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, William M. Taylor, Judge Presiding in Cause No. 3-74-1231-C entitled "Lawrence F. Lee, Jr., et al. v. Navarro Savings Association" is found at 416 F. Supp. 1186 (N.D. Tex. 1976).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550, likewise

entitled, is reported at 597 F.2d 421 (5th Cir. 1979).

As required by Supreme Court Rule 23(i), copies of the opinions of the Courts below have been appended to the Petitioner's Petition for Certiorari, and such opinions are not again reproduced in the Appendix.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this cause as shown by the following:

1. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and was entered of record on June 18; 1979.

2. The Suggestion for Rehearing En Banc filed by Petitioner (Appellee in the Court below) was denied August 1, 1979. By order entered August 15, 1979, the Court of Appeals stayed the issuance of its mandate pending Petition for Writ of Certiorari to this Court through and including September 16, 1979; and by subsequent order extended to September 21, 1979.

3. The Supreme Court of the United States granted the Writ of Certiorari pursuant to 28 U.S.C. §1254(1), by order dated November 26, 1979.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of the provisions of 28 U.S.C. §1332(a) which provide as follows:

> §1332. Diversity of citizenship; amount in controversy; costs.

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

ISSUE PRESENTED FOR REVIEW

Whether for purposes of the diversity jurisdiction of the District Courts of the United States, the citizenship of a real estate investment trust should be determined with reference to the citizenship of its trustees rather than that of its beneficial shareholders by application of "real party in interest" rules or for any other reason.

STATEMENT OF THE CASE

A. Procedural Background

This case was originally brought in the State District Court of Texas, 116th Judicial District sitting at Dallas County, Texas in March, 1974 by Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W.

York and Jack H. Quaritius, each of whom are Trustees of Fidelity Mortgage Investors, a real estate investment trust, with its principal offices at Jacksonville, Florida, against the Petitioner, Navarro Savings Association, as Defendant.[1] The substantive cause of action was for Navarro's alleged fraud and breach of contract in the issuance and dishonor of a loan commitment letter by Navarro, a corporate citizen of Corsicana, Navarro County, Texas.

Following evidentiary proceedings and the resulting transfer of the case to the State District Court at Navarro County, Texas, the Trustees dismissed the State action and refiled in the United States District Court for the Northern District of Texas. The Plaintiff-Trustees brought the action in their capacity as Trustees only and asserted the existence of federal diversity jurisdiction.

Upon Navarro's motion, the question of lack of complete diversity was raised; and the District Court thereupon granted leave to the Trustees to amend their complaint. Although the Amended Complaint alleged three additional grounds of jurisdiction as alternatives to diversity, the District Court dismissed the Amended Complaint, concluding that the Trustees had failed to sustain their burden of establishing jurisdiction. Specifically, by his memorandum opinion and order, the Court below determined that diversity jurisdiction did not exist in that the residence of the shareholders of FMI—as opposed to that of the Trustees only—was

[1]For clarity, reference to the Petitioner will be made by the name of "Navarro" and reference to the Respondents will be by the name of "Trustees." Reference to Fidelity Mortgage Investors as an entity will be as "FMI."

controlling. The District Court further determined that the Trustees had failed to establish any of the other alleged bases for federal jurisdiction.[2]

On appeal to the United States Court of Appeals for the Fifth Circuit, the Trustees emphasized, as they did in the District Court, the question of diversity jurisdiction. The Court of Appeals reversed, by a 2-1 majority, holding that the Trustees were "the real parties in interest" and, their citizenship being completely diverse to that of Navarro, jurisdiction under 28 U.S.C. §1332(a) was proper. In its opinion, the panel majority focused only on the diversity jurisdiction issue and, concluding that the District Court had erred in dismissing the case, did not reach the remaining grounds for federal jurisdiction.

In a dissenting opinion, Judge Vance concluded that "a party cannot unilaterally confer subject matter jurisdiction on a federal court by declaring who is to represent the trust in legal actions."

It is respectfully submitted that the opinion of the majority of the Court of Appeals in this cause is in direct conflict with the reasoning of the Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935). This is a

[2]The other grounds alleged were the Securities Act of 1934; class action under Rule 23.2 of the Federal Rules of Civil Procedure; and Federal Bankruptcy Act jurisdiction, FMI having become a debtor-in-possession subsequent to the filing of the Original Complaint. The District Judge determined that the claim under the 1934 Act was frivolous; that the class action procedure was unavailable; and that Navarro had not consented to Bankruptcy Act jurisdiction.

case of first impression in this Court, and the Court of Appeal's decision clearly overrules or conflicts with the decisions of the district courts of several Circuits in *Larwin Mortgage Investors v. River Drive Mall, Inc.*, 392 F. Supp. 97 (S.D. Tex. 1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 41 F. Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F. Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F. Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F. Supp. 120 (D. Ore. 1978); *National City Bank v. Fidelco Growth Investors*, 446 F. Supp. 124 (E.D. Pa. 1978).

So far as is known to counsel for Navarro, the only decisions of other Circuits directly concerning this issue are *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978) and *Belle View Apartments v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979) in both of which the Courts denied diversity jurisdiction.[3] Accordingly, the decision of the Court of Appeals in the instant case is contrary to all prior cases in which

[3]But see *First Florida Building Corporation v. Smith*, 599 F.2d 447 (5th Cir. 1979) (an unpublished opinion of the Fifth Circuit summarily reversing an order of dismissal, on the authority of the panel majority's opinion in the instant case); *Willowood Condominium Ass'n, Inc. v. HNC Realty Co.*, 531 F.2d 1249 (5th Cir. 1976) wherein the Court observed in passing that the case was "properly grounded in diversity jurisdiction"; and *In Re Vento Development Corp.*, 560 F.2d 2 (1st Cir. 1977) which case apparently the Fifth Circuit considered distinguishable for it is not cited in the majority opinion in this case.

the issue of citizenship of an unincorporated business association has been directly presented. Most importantly, the holding of the Court of Appeals majority in this cause is, as observed by its dissent, a judicial extension of diversity jurisdiction contrary to the mandate of this Court in *Bouligny* that such extensions are exclusively within the legislative domain.

B. Factual Background

The Trustees' "First Amended Original Complaint" (A. 3-31; hereinafter referred to as the "Complaint") alleges:

> "The above-named Plaintiffs, Trustees of Fidelity Mortgage Investors, a Massachussetts business trust (hereinafter "FMI" or "Plaintiff") complain of Defendant Navarro Savings Association as follows. The above-named Plaintiffs are individuals, all of whom are residents and citizens of states other than the State of Texas. They bring this action in their capacity as Trustees of FMI . . ." (A. 3).

The Trustees assert that it is they, and they alone, who are individuals exclusively empowered to prosecute the instant cause of action. While the Declaration of Trust (A. 40-89) purports to convey to the Trustees and their respective successors in office, the power:

> "To collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon or adjust, any actions, suits, claims, demands or other litigation relating to the Trust, the Trust Estate or the Trust's affairs." (A. 54);

The Declaration further provides:

> "A Trustee may be removed with or without cause

by the vote of a majority of the outstanding Shares or with cause by vote of a majority of the Trustees. Upon the resignation or removal of any Trustee, he shall execute and deliver such documents and render such accounting as the remaining Trustees shall require and shall thereupon be discharged as Trustee." (A. 47).

Neither the resignation, death or removal of any Trustee (A. 47-48) nor the death or incapacity of any Shareholder (A. 64) affects the continuation of the Trust. Shares are freely transferrable as personal property (A. 63-64).

Further, the Declaration of Trust provides:

"Upon the resignation, removal or death of a Trustee he (and in the event of his death, his estate) shall automatically cease to have any right, title or interest in or to any of the Trust Estate, and the right, title and interest of such Trustee in and to the Trust Estate shall vest automatically in the remaining Trustees without any further act." (A. 48).

The Declaration of Trust requires the affirmative vote of a majority of the outstanding shares of the Trust to approve the sale or other disposition of assets comprising more than 50% of the Trust Estate (A. 67).

In Article VII of the Declaration of Trust, it is provided that the Trustees may not be held personally liable for any act or omission in tort, contract or otherwise in connection with the affairs of the Trust, except that arising from willful misfeasance, gross negligence or the like (A. 70). Similarly, the Trustees, officers of the Trust and shareholders may not be subjected to personal liability for any debt, claim or judgment "against or with respect to the Trust, arising

out of any action taken or omitted for or on behalf of the Trust and the Trust shall be solely liable therefor and resort shall be had solely to the Trust Estate for the payment or performance thereof" (A. 70-71).

The Declaration of Trust expressly deems its creation to be a "Massachusetts business trust" and directs that to the extent permitted, the duties and liabilities of its Trustees are the same as the officers and directors of a corporation (A. 77).

Termination of the Trust may be effected by the affirmative vote of the majority of outstanding shares (A. 79) and amendment of the Declaration may be accomplished in like fashion (A. 80).

Comparison of paragraph 2.2 of the Declaration of Trust with its paragraph 2.4 indicates that while the resignation or removal of any Trustee may occasion his being required to "execute and deliver such documents and render such accounting as the remaining Trustees shall require" (A. 47), such would appear to be superfluous because "the right, title and interest of the Trustees in and to the Trust Estate shall vest automatically in all persons who may hereafter become Trustees upon their due election or appointment and qualification *without any further act*, . . ." (A. 48). Indeed, under paragraph 3.2(u) the Trustees have the power:

"To cause legal title to the Trust Estate to be held in the name of the Trustees or, except as prohibited by law, in the name of the Trust or one or more of the Trustees or any Person or nominee designated by the Trustees, on such terms, in such manner, with such powers as the Trustees shall determine and with or without disclosure that the Trust or the Trustees are interested therein." (A. 54)

Under paragraph 4.1 of the Declaration, the Trustees are invested with the authority to delegate all of their powers to a manager "without regard to whether such authority is normally granted or delegated by trustees" (A. 56).

The Trustees have alleged that none of them, as individuals, are residents of the State of Texas (A. 3); however, it has been expressly stipulated that 'there were at the time of filing of the Complaint and continue to be beneficial shareholders who are residents of the State of Texas (A. 37).

Additional facts are set forth, infra, in the Argument and Authorities portion of this Brief.

ARGUMENT AND AUTHORITIES

ISSUE: WHETHER THE CITIZENSHIP OF AN UNINCORPORATED BUSINESS ASSOCIATION–A "REAL ESTATE INVESTMENT TRUST"–FOR THE PURPOSES OF THE DIVERSITY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES, IS THAT OF EACH OF ITS SHAREHOLDERS.

SUMMARY OF THE ARGUMENT

The Court of Appeals reached its result by application of Rule 17(a), F.R.C.P., to determine that the Trustees were the "real parties in interest" to whose residence the courts must look for the purpose of determining diversity jurisdiction. This approach is deficient in several respects: *First*, it is expressly contrary to Rule 82, F.R.C.P., and its constitutional

underpinnings which prohibit the utilization of the federal rules to expand or contract jurisdiction; *second*, the application in this case is based upon incorrect factual premises; and *third*, the "case-by-case" analysis which this approach compels (as conceded by the Court of Appeals) creates an enormous potential for inconsistency as well as for manipulation by litigants.

In any event, it has long been held by this Court that for diversity purposes, the "real parties in interest" of any collective entity conducting business on an on-going basis are the several owners. This rule has been applied, uniformly, to corporations (perhaps the most extreme case), joint stock companies, unincorporated associations, and to both general and limited partnerships. In so holding, this Court has refused to consider as controlling, the intricate and often artificial distinctions in form of ownership, operation or control frequently engendered by tax considerations or the necessity to conform to the idiosyncracies of local law.

In *Marshall v. Baltimore & Ohio. R.R.*, 157 U.S. (16 Howard) 314, 14 L.Ed. 453 (1853), the Court adhered to the foregoing rule, but adopted a fiction by which it would be presumed that the residence of the shareholders of a corporation (the "real parties in interest") was the place of incorporation. This fiction persisted until 1958, when Congress mandated that, for diversity purposes, a corporation is a citizen of the state of its incorporation and of the location of its principal office.

Following *Marshall* came a series of cases, e.g., *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889), and *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842

(1900), wherein the Court was asked, but expressly refused to extend the residence fiction to any other collective entity. The last such effort was in *United Steelworkers v. Bouligny*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965), in which case the Court refused to apply the fiction to a labor union (an unincorporated association) and observed that such fictions were tantamount to an expansion of diversity jurisdiction–a matter resting in the discretion of Congress alone.

Without repudiating *Bouligny*, the courts cannot create a new fiction to accommodate the Trustees in this case. If the underlying premise of *Marshall*–that the shareholders are the real parties in interest–remains vital, the Court of Appeals' attempt at accommodation is clearly contrary thereto and cannot stand. There appears to be no good reason to conclude, as the Court of Appeals apparently did, that the shareholders of FMI are somehow *not* the real parties in interest, whereas the shareholders of a corporation *are*. This is particularly true where, as here, the factual premises do not compel the conclusion reached, and the distinction-making process itself carries with it the problem potential alluded to above.

This Court should therefore conclude, as did Circuit Judge Vance in his dissent, that the holding of the Court of Appeals majority is but an effort to expand diversity jurisdiction, inherently creating as many problems as it solves, and in any event an effort which is expressly precluded by the federal rules and the holding of this Court in *Bouligny*.

POINTS OF ARGUMENT

A real estate investment trust is an unincorporated business association rather than an express trust; accordingly, the residence of each of its shareholder beneficiaries is determinative upon the issue of citizenship for diversity purposes pursuant to 28 U.S.C. §1332(a).

Fidelity Mortgage Investors ("FMI") is a profit-oriented "business trust," whose principal occupation is the investment of the trust assets in mortgage loans on real property. According to the Declaration of Trust which created FMI, apparently much of the day-to-day business of the trust is managed by its Board of Trustees, while the shareholder beneficiaries have the authority to elect and remove trustees and to approve any sale or other disposition of assets comprising 50% or more of the trust estate. Admittedly, FMI has many of the attributes of an incorporated entity such as a centralized management, transferability of shares, continuity of business, etc. Were FMI a corporation and considering its principal place of business to be without the State of Texas, it is clear that diversity of citizenship would exist with the Texas Defendant, Navarro Savings Association.[4] However, both here and in the courts below[5] the Trustees have disclaimed any theory of corporate enterprise choosing instead to rely on the theory that the Trustees, through their powers under the Declaration of Trust, are the "true parties in interest" as such term is defined in Rule 17 of the

[4] 12 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 836 (1975).

[5] Memorandum Opinion and Order of Judge Taylor at footnote 1; Appellants' Brief in the Court of Appeals at page 5.

Federal Rules of Civil Procedure.[6]

Relying upon the case of *Larwin Mortgage Invest-*

[6]The argument urged by the Trustees and apparently accepted by the Court of Appeals that "traditional analysis" should be applied in this case, to determine the "real parties in interest," is based upon several cases which are, on their facts, distinguishable from this case. Thus, in each of *Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 1972, 20 L.Ed. 1979 (1870); *Dodge v. Tulleys*, 144 U.S. 451, 12 S.Ct. 728, 36 L.Ed. 501 (1892); and *Bullard v. City of Cisco*, 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254 (1933), the Supreme Court was concerned with express trusts created for the purpose of securing payment of mortgages on real property or, as in *Cisco*, coupon bonds issued by a municipality. In no instance was the trusteeship created for the purpose of operating an on-going business with the attendant features of transferrable shares, continuity of interest, purchase, replacement and sale of assets, sharing of profits, etc. While in each case, the trustees involved were invested with varying degrees of authority, their powers were always tied ultimately to some specific res or indenture transaction. As the Court determined in *Morrissey, supra*, the superficial indicia common to both entities, such as vesting the trustee with legal title to the assets, is not controlling. Rather it is the purpose for which the trusteeship is created which controls. *Fidelco, supra*, 446 F. Supp. at 127, n.3.

The cases of *Curb and Gutter Dist. No. 37 v. Parrish*, 110 F.2d 902 (8th Cir. 1940); and *Allen-West Commission Co. v. Brashear* 176F. 119 (Cir. Ct. E.D. Ark. 1910), cited by the Trustees involved similar facts. *Parrish* involved the trustee in a municipal bond situation; *Allen-West* involved a real estate deed of trust. The precedental value of *Dodge v. Tulleys, supra*, and *Houston Oil Company v. Village Mills Co.*, 241 S.W. 122 (Tex. Comm. App. 1922, holding approved) are further diminished by the fact that in those cases, the representative parties were also the true parties in interest and all being before the Court, the question of lack of jurisdiction was insignificant. See *Des Moines Navigation and R.R. Co. v. Iowa Homestead Company*, 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 212 (1887).

ments v. Riverdrive Mall, Inc., 392 F. Supp. 97 (S.D. Tex. 1975) and other cases which are discussed infra, the District Court concluded that the citizenship of FMI was properly determined with reference to the residence of each of its beneficial shareholders. In that the Trustees failed to sustain their burden to plead and prove[7] the absence of any Texas shareholders in FMI (and, in fact, stipulated their existence), the presence of whom would destroy the complete diversity requirement of 28 U.S.C. §1332(a), diversity jurisdiction was lacking.[8]

In *Larwin*, the court considered the precise issues presented in this case. Larwin Mortgage Investments was a California real estate investment trust which advanced funds for interim financing of a construction project in Laredo, Texas. The shares of beneficial interest were publicly held by several thousand shareholders and traded on the New York Stock Exchange. The declaration of trust establishing Larwin provided that:

> "While legal title to the trust assets rests exclusively in the trustees, the shareholders (holders of beneficial interest) are empowered to remove trustees, with or without cause, and fill trustee vacancies. Additionally, shareholders' consent must be obtained before the consummation of any transaction which involves the disposition of more than 50% of the trust estate." [Footnotes

[7]*Ray v. Bird and Son*, 519 F.2d 1081 (5th Cir. 1975).

[8]*Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Shainwald v. Lewis*, 108 U.S. 158, 2 S.Ct. 385, 27 L.Ed. 691 (1883); *Mas v. Perry*, 489 F.2d 1396, reh. den. 492 F.2d 1242 (5th Cir. 1974), cert. den., 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70.

omitted] 392 F. Supp. at 100.

The Court considered Larwin's two contentions: (i) that it was a juridical entity in and of itself, whose citizenship was California; and (ii) alternatively, that as an active trust, only the residence of its trustees should be considered for diversity purposes. 392 F. Supp. at 98.

The district judge in *Larwin*, as did the district judge in this case, determined that the decision of the United States Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) precluded extension of the "corporate citizenship" fiction to unincorporated associations for diversity purposes.[9] The Court then determined that the characteristics of Larwin as a business organization—particularly the rights of the beneficial interest holders to approve certain transactions and to elect or remove the manager-trustees—predominated over its outward appearance as a "conventional" trust. The Court analogized to the question before the United States Supreme Court in *Morrissey v. Commissioner*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) where it was observed that:

> "The object [of the business trust] is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of business and

[9]See also *Baer v. United Services Automobile Association*, 503 F.2d 393 (2nd Cir. 1974); *Fox v. Prudent Resources Trust*, 382 F. Supp. 81 (E.D. Pa. 1974); *Lowry v. International Brotherhood of Boilermakers*, 259 F.2d 568 (5th Cir. 1958); 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3630 at 848 (1975).

> sharing its gains." 296 U.S. at 357, 56 S.Ct. at 295.

Concluding that the Trustees were therefore not the "real parties in interest" (as they would be in the case of a conventional trust) the court dismissed Larwin's alternative contention.

In *National City Bank v. Fidelco Growth Investors*, 446 F. Supp. 124 (E.D. Pa. 1978) the district judge reviewed all the relevant authorities and concluded that the reasoning applied in *Larwin, supra*, was appropriate. In *Fidelco*, the REIT was the defendant in a diversity-based suit and was, in fact, the party alleging the lack of jurisdiction. Recognizing "the significant difference between the business trust and the conventional trust-differences both in purpose and structure . . ." the court concluded that the REIT could not be treated as a conventional trust and must therefore be treated as an unincorporated association. 446 F. Supp. at 128.

In *Fidelco*, the plaintiffs emphasized the degree of control exercised by the trustees over the business and assets of the REIT. The Court observed:

> "This, [plaintiffs] contend, makes Fidelco a conventional trust, rather than an unincorporated association such as a partnership. I cannot agree. True, under the general rule, the degree of control vested in the trustees largely determines whether an entity will be treated as trust or partnership *when personal liability is sought to be imposed on the shareholders.* See, e.g., *Hecht v. Malley, supra*, 265 U.S. at 147, 44 S.Ct. 462 (discussing Mass. decisions); 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §8230 at 554-55, 8261 (1962 & Supp. 1977). The issue in this case

> is entirely different. It is whether a business trust sufficiently resembles a conventional trust to be accorded like treatment in the determination of its citizenship for diversity purposes. Thus, as was the case with Fidelco's REIT status, the control vested in the trustees does not, without more, require that Fidelco be treated as a trust. Nor does Fidelco's REIT status, when taken together with the trustee's extensive control over its affairs, require that Fidelco be viewed as a trust. Both characteristics evidence some similarities between Fidelco and the conventional trust, but in my view, this similarity is largely offset by the several dissimilarities referred to earlier." 446 F. Supp. at 129.

That *Larwin* and *Fidelco* deal squarely with the issue presented here cannot be denied. That every other reported decision has followed the rationale of *Larwin* is likewise indisputable. See, e.g., *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978); *Belle View Apartments v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F. Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F. Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F. Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F. Supp. 120 (D. Ore. 1978).

In each of those cases the same arguments advanced here were rejected with the observations that "Pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be

made to the Congress and not to the Court," *Bouligny, supra*, 382 U.S. 145, 150-151, 86 S.Ct. 272, 275; and that "to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants." *Chase Manhattan, supra*, 405 F. Supp. 593, 595.

The theory that the Trustees are the real parties in interest as that term is defined in Rule 17(a) F.R.Civ.P. is incorrect. In the *Chase Manhattan* case, supra, the Court rejected this argument for two reasons: first, that each of the prior decisions to the effect that citizenship of the shareholders is controlling implicitly presumes that they are the real parties in interest; and second, the substantive State law granting the trustees capacity to sue in their own names does not bestow diversity jurisdiction. Each of the District Court decisions cited above are in accord with this construction.

Under the holding of the panel majority in this case, the beneficial interest holders of a real estate investment trust may create or destroy diversity jurisdiction through the simple device of removal or appointment of a trustee having a residence which, when compared to the opposing party, suits the REIT's purpose. Navarro urges that this goes beyond the intent of Congress and conflicts with the *Bouligny* case, *supra.*

The opinion of the Court of Appeals majority in this case holds that Rule 17(a) is correctly applied in the facts of this case. However, it is respectfully submitted that Rule 17(a) does not comprehend the "business trust" as distinguished from the conventional trust. In analyzing why the Rule is inapplicable, it is perhaps appropriate to use as a point of departure, the evolutionary changes in the jural status of corporations.

In the Fourth Circuit's opinion in the *Bouligny* case[10] Judge Bell traced these changes beginning with *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 3 L.Ed. 38 (1809) where the principle was set forth that the corporation is "a mere creature of the law, invisible, intangible and incorporeal." The Supreme Court upheld the doctrine that the courts of the United States had not been invested by Congress with the authority to look to the corporate name to the exclusion of the citizenship of its stockholders, notwithstanding the fact that the corporation could sue and be sued in its own name.

The Supreme Court apparently reversed itself in the case of *Louisville C. & C.R.R. v. Letson*, 43 U.S. (2 Howard) 497, 11 L.Ed. 353 (1844) holding that the consequences and inferences drawn from the reasoning in the cases of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 277 (1806) and *Bank v. Deveaux, supra* "were carried too far." Reviewing the attributes of a corporation, the Supreme Court observed:

> "We confess our inability to reconcile these qualities of a corporation–residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the Courts of the United States, unless in consequence of a residence of all of the corporators being of the State in which the suit is brought. When the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Court jurisdiction." 43 U.S. at 559; 11 L.Ed. at 378.

[10]*R. H. Bouligny, Inc. v. United Steel Workers of America*, 336 F.2d 160 (4th Cir. 1964).

Finally, in *Marshall v. Baltimore and Ohio R.R.*, 57 U.S. (16 Howard) 314, 14 L.Ed. 953 (1853) the Supreme Court, held that there would be made the "presumption arising from the habitat of a corporation in the place of creation [as] being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it." 57 U.S. at 329; 14 L.Ed. at 326.

The *result* (although not the rationale) accomplished through the fiction created by *Marshall v. Baltimore and Ohio R.R., supra*, was codified by the 1958 amendments to 28 U.S.C. §1332, where Congress declared that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The significant factor is that Congressional action was required to achieve the particular result sought, i.e., a broad but uniform policy for treatment of chartered corporations for diversity purposes. The 1958 amendment thus displaced the "legal fiction" achieved in *Marshall v. Baltimore and Ohio R.R.*, but did not serve to alter the original premise from which the fiction arose.

Viewed in this context, there becomes discernible a pattern of treatment for diversity purposes, of the various types of non-incorporated associations of individuals collectively joined under a common name. *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889) thus represents the Supreme Court's refusal to extend the legal fiction of *Marshall*–or to create a new device–in the case of a joint stock company. The Court observed:

> "But the express company cannot be a *citizen* of

New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court." [Emphasis by the Court] 129 U.S. at 682; 32 L.Ed. at 801-02.

In *Great Southern Fireproof Hotel Company v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900) the Supreme Court again refused to extend the presumptive citizenship device, this time in the case of limited partnerships, the Court stating:

"But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation [citations omitted]. The rule that for purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation was deemed a citizen of the state creating it, has been so long recognized and applied that it is not now to be questioned. No such rule, however, has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a Circuit Court of the United States

as resting on the diverse citizenship of the parties, we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.

* * *

That a limited partnership association created under the Pennsylvania statute may be described as a 'quasi corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. *That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.*" 177 U.S. at 456-57; 44 L.Ed. at 845. [Emphasis added.]

In the case of *Thomas v. Ohio State University Trustees*, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160 (1904) the Supreme Court refused to extend, on the averments contained in the bill, collective citizenship to the Board of Trustees of a State university. The argument that the legislative act creating the Board sufficiently endowed that body with the characteristics of a corporation so as to bring it within the rule in the *Marshall* case was rejected. In answering the questions certified by the Circuit Court, the Supreme Court concluded that the Board was neither a corporation nor did the bill aver facts which constituted it as such. The Court concluded that the Ohio law did sufficiently invest the Board with the juridical status to sue and be sued in the collective name "without bringing the several persons constituting the Board before the Court as defendants, provided the bill had contained the additional allegation that each individual Trustee was a citizen of Ohio." 195 U.S. at 218; 49 L.Ed. at 167.

The decision of the Supreme Court in *Bouligny* is in

harmony with these antecedents and represents a predictable refusal to extend the doctrine to another species of unincorporated association. Rather, the Court there deferred to Congress to create, by statutory enactment, such presumptions as deemed proper as a policy matter. It would therefore seem wholly inconsistent that the Supreme Court, in promulgating Rule 17 of the Federal Rules of Civil Procedure, would disregard the principle so carefully enunciated in the foregoing cases.

It is, of course, the declared policy of the Federal Rules that such Rules "shall not be construed to extend or limit the jurisdiction of the United States District Courts," Rule 82 F.R.C.P. Thus Rule 17(a) cannot expand or contract the District Court's diversity jurisdiction, that being a matter reserved, under the Constitution, to Congress alone. It follows that analysis of this case in terms of, or by analogy to, "real party in interest" concepts is not particularly useful. Indeed, this case presents but another effort to create a legal fiction in order to confer diversity jurisdiction—a judicial exercise which has been expressly foreclosed by *Bouligny* and its antecedents.

The majority opinion of the Court of Appeals in the case at bar, cites with approval the decision of the Second Circuit in *Colonial Realty Corporation v. Bache & Co.*, 358 F.2d 178 (2nd Cir. 1966), *cert. denied*, 385 U.S. 817, 87 S.Ct. 40, 17 L.Ed.2d 56 (1966). There it was held that in a diversity-based suit against a limited partnership, the district court need concern itself only with the residence of the general partners and not that of the limited partners. The Court in *Colonial Realty* offers little exposition of the basis for its decision and,

notwithstanding this Court's refusal to review that case, it is respectfully submitted that the result was completely at variance with the applicable precedents. The Third Circuit criticized and refused to follow the anomalous result reached in *Colonial Realty* in the case of *Carlsberg Resources Corporation v. Cambria Savings & Loan Association*, 554 F.2d 1254 (3rd Cir. 1977). The Court there observed:

> "In the first place, we are troubled by the readiness with which *Colonial Realty* engrafts capacity-to-sue rules to the traditional requirements of diversity jurisdiction. As we view it, jurisdiction is the *most* elemental concern of the federal courts in evaluating the cases which come before them. By contrast, issues pertaining to the capacity to sue, while hardly lacking in significance, are deserving of consideration only after the jurisdiction of the federal court has been firmly established. It may be for this reason that the Supreme Court has, in the leading cases concerning partnerships and other nonincorporated associations, declined to view problems involving diversity jurisdiction through the perspective of capacity to sue." [Footnote omitted] 554 F.2d at 1260.

The *Carlsberg* court observed that Rule 17 F.R.C.P. was not authority to refer the district courts to the law of the forum state to determine federal diversity jurisdiction, a procedure contrary to the overriding considerations of Rule 82. The court stated:

> "To import state law concepts of capacity to sue into evaluations of jurisdiction, explicitly or implicity under Rule 17, would appear to have a definite effect on jurisdiction. Specifically, to ignore an identity of citizenship between limited partners and litigants with opposing interests,

because of reliance on state statutes concerning the capacity to sue, does operate to liberalize access to the federal courts under diversity jurisdiction. It would seem to follow that Rule 82 bars the utilization of Rule 17 in this context.

* * *

One ramification of the *Colonial Realty* approach is to empower state legislators or state courts to determine the perimeters of federal jurisdiction.

* * *

In our view, it would not be advisable to adopt the *Colonial Realty* rule. For to do so seemingly, would make diversity jurisdiction, in situations such as the one at hand, largely dependent upon the vagaries of state law. Also troubling would be the prospect of disparate treatment of litigants whose ability to vindicate their interests in federal court, under the diversity provisions, would be equally dependent upon state law. Availability of diversity jurisdiction, we believe, ordinarily *should not rest upon considerations of state law but rather upon uniform and readily cognizable principles of general application.*" 554 F.2d at 1261. [Emphasis added.]

If the rule as enunciated in *Carlsberg* is correctly applied in the case of limited partnerships, it is difficult to perceive any reason why it should be differently applied in the case of the REIT. Both entities are unincorporated associations formed for the purpose of carrying on a business enterprise and both are composed in whole or at least in part of individual equitable interest holders whose liability vis-a-vis third parties is limited to their respective undivided interests in the collectively owned assets. That both types of associations may, from time to time, bear other similarities, e.g., transferability of interests, delegated

management, continuity of business irrespective of the death or resignation of a member, merely confirms that these entities are properly treated as indistinguishable for federal diversity purposes.

The Court of Appeals cited with approval the Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U.Chi. L.Rev. 384. The author of that article, in concluding that the rule of *Colonial Realty* is the correct one, based his conclusion on the premise that "a jurisdictional test that looks to the real parties to the controversy not only makes sense of the diversity precedents, but also accords well with the protective policies underlying the diversity jurisdiction, a policy which remains vital today." 45 U.Chi.L.Rev. at 417-18.

This proposed approach confuses the procedural requirements of Rule 17 with substantive law requirements, contravening the express strictures of Rule 82. The commentator's assertion that "control" of the entity's business affairs (be it corporation, limited partnership or REIT) confers "real party" status on the managers is incorrectly premised. The author asserts, in a footnote quoted by the majority opinion that:

> "Trust Agreement terms that permit the beneficiaries to remove the trustees or to prevent transfers of trust property do not seem to vest the management of the trust in the beneficiaries; such provisions only give beneficiaries certain powers that corporate shareholders commonly wield." See 597 F.2d at 427, footnote 6.

This analysis ignores the obvious fact that in either form of business enterprise, the ultimate power of management resides in those individuals holding a sufficient percentage of ownership to remove the

managers whether they be directors, officers, general partners or trustees. Moreover, the analysis disregards the fact that the unique treatment accorded corporations prevails only through judicial fiat and the subsequent congressional codification of that result.

In holding, in effect, that under Rule 17(a) the declaration of trust governing the association of shareholders in a Massachusetts-type business trust controls, the majority relegates the determination of federal jurisdiction to such shareholders and presumably, would permit them to create or destroy diversity as from time to time may suit their purposes. In this case, while the Trustees admittedly have a great deal of control over the day-to-day management of the business of FMI, it is still the case that the beneficial interest holders ultimately have the power of removal of the Trustees by simple majority vote, as well as the right to control disposition of the trust assets in certain circumstances.

The opinion of the Court of Appeals in this case appears to place great emphasis upon the Trustees as being a "class of membership" distinct from the overall body of shareholders. This distinction is ephemeral. The Trustees not only have the power to delegate to an appointed manager all of their powers *without regard to whether such authority is normally granted or delegated by trustees* (A. 56), but also legal title may be vested in any "person or nominee designated by the Trustees" (A. 54) without even the necessity of disclosure of such fact. These are powers, either of which standing alone, would serve to distinguish the Trustees of FMI from those of a conventional trust as contemplated by Rule 17(a). The purported distinction between these "classes

of membership" is further blurred by the fact that no Trustee or shareholder may be held *personally* liable for any action in tort, contract or otherwise "in connection with the affairs of the Trust" (A. 70). If the intention of FMI is to limit liability to the assets of the Trust Estate—as it appears is the case—then analysis of the Trust's organic composition on a "class of membership" basis is irrelevant.

It will be recalled that in *Independence Mortgage Trust v. White, supra*, the business trust was attempting to *defeat* diversity jurisdiction.[11] It is not difficult to imagine the situation where a business trust such as FMI might, in a case of sufficient importance, remove one or more Trustees and substitute others so as to create or destroy diversity jurisdiction as suits the immediate purpose.

In this case, the record is not clear as to whether all Trustees of FMI were joined as Plaintiffs since, on the Amended Complaint, some of the names which originally appeared have been dropped. Whether there are other Trustees of FMI who are citizens of the State of Texas and whether any of the Trustees are themselves beneficial interest holders in the association does not appear from the record. However, the potential for abuse is apparent. Thus, resort to the trust

[11]See also *First Florida Building Corp. v. Smith*, 599 F.2d 447 (5th Cir. 1979) and *Belle View Apts. v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979). The latter case is particularly in point because initially, the REIT in that case invoked the jurisdiction of the federal court by *removal* from a state court alleging diversity in the removal petition. Subsequently, after an adverse judgment on the merits, the REIT raised the jurisdictional issue for the first time, and succeeded in obtaining a reversal.

instrument to determine the real parties in interest is of questionable value because of the transitory nature of the results and the potential for abuse.

The *Bouligny* case, is the predicate for the rationale of the *Larwin* line of decisions but is itself no more than the extension to one more class of unincorporated associations, i.e., the labor union, of the rule set forth in the case of *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889). As was observed by Mr. Justice Fortas, speaking for a unanimous Court:

> "In recent years courts and commentators have reflected dissatisfaction with the rule of Chapman vs. Barney. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions *and other unincorporated associations*, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference." 382 U.S. at 142-150; 15 L.Ed.2d at 219-20 (emphasis added).

The Court then sets out the arguments for disregarding the distinctions between the corporation and its unincorporated counterpart and concludes with the now-familiar observation that "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 at 150-51; 15 L.Ed.2d at 220.

The Court further pointed out the difficulties which would ensue if the Court sought to formulate some general principle for ascertaining of which state such labor union is a citizen. The same difficulties may be easily envisioned as to other species of unincorporated associations, not the least of which is the real estate investment trust.

For example, the Declaration of Trust creating FMI appears to have been executed and recorded at Boston, Massachussetts (A. 89); however, the association's secretary, Arthur W. Milam, resides at Jacksonville, Florida (A. 78) which city and State appear to be the true "nerve center" of FMI as evidenced by the residence of FMI's investment advisors (A. 29). This is perhaps not conclusive because FMI's Debtor in Possession proceedings in the United States Bankruptcy Court were apparently filed in the Southern District of New York (A. 38) where under Bankruptcy Rules, it must have resided or conducted a significant portion of its business. The record is far from conclusive on this point but it is clear that so far as the "entity" concept is concerned, there is more than one likely candidate for the domicile of an unincorporated association such as FMI.

The inquiry is confused all the more by reason of the Trustees' abandonment of the entity concept and insistence upon the residence of the Trustees as being the controlling factor (A. 3). The potential for abuse of this device has already been noted. Moreover, application of the rule of *Chapman* and *Bouligny* to *any* unincorporated association has to commend it its simplicity and ease of application. For example, in *Chapman*, the subject entity was a joint stock company.

In *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n, supra*, 554 F.2d 1254 (3rd Cir. 1977), the rule of *Chapman* was applied to a limited partnership.

In *Carlsberg*, the Court considered the closely analogous problem and concuded that the teaching of the case of *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900) is that:

> "... In dealing with partnerships, limited and otherwise, we should look to the citizenship of the partners to determine whether diversity of citizenship exists." 554 F.2d at 1258.

The Court further concluded that:

> "Implicit in the opinion in *Chapman* may be a refusal by the Supreme Court to differentiate between classes of association or partnership members regarding questions of diversity. In that case, there were in essence, two such classes—one consisting of the president, a member with capacity to sue by virtue of state law, and another comprised of all other partners in the enterprise." 554 F.2d at 1259.

The opinion of the Court of Appeals in the instant case further holds that the case of *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) is inapposite. In that case, the business trust was held to be an unincorporated association for the purposes of taxation. It is respectfully suggested that the panel majority errs in holding *Morrissey* to be inapposite. The characterization of the REIT for tax purposes, while not necessarily controlling, is instructive for determining its status for other related purposes including federal court jurisdiction.

A fair reading of *Larwin* clearly militates against the conclusion that the district judge considered the tax treatment of REIT's as determinative. The Court observed: "The problem of whether Larwin should be treated, for diversity purposes, as a trust or as an unincorporated association, *appears analogous* to that before the Supreme Court in *Morrissey*..." 392 F. Supp. at 100 (emphasis added); and further stated:

> "The advantageous treatment of such publicly-held trusts under certain provisions of the Internal Revenue Code of the United States does not require the courts to treat any such trusts as a traditional trust." 392 F. Supp. at 101.

In each of the other cited cases, it is clear that the respective courts were applying the *Morrissey* reasoning by analogy only.[12] As the district judge observed in *Lincoln Associates, supra*, and reiterated in his opinion in this case:

> "The issue before the Court turns not upon an election by [the REIT] under the tax code which results in its being a 'real estate trust' rather than a 'real estate investment trust,' but rather upon the intrinsic nature and purpose of [the REIT] as a business enterprise." 415 F. Supp. at 354.

Indeed, analysis of the Supreme Court's opinion in *Morrissey*, indicates it is not mere semantics to state that this Court was concerned not with the question of the tax treatment of the trust in question, but rather

[12] *Lincoln Associates v. Great American Mortgage Investors, supra*, 415 F. Supp. at 354-55; *Jim Walter Investors v. Empire-Madison, Inc., supra*, 401 F. Supp. at 429. Apparently, in the other cited cases, the taxation aspect of REIT's was of even less weight or not a factor at all in the ultimate decision.

whether such trust, as a business enterprise, was sufficiently distinct from a traditional "trust" as to render it an "association" for any purpose including, incidentally, taxation. *Morrissey, supra*, 296 U.S. at 356-60, 56 S.Ct. at 295-96; *Fidelco, supra*, 446 F. Supp. at 127, n.3.

From the foregoing analysis of the relevant cases three important facts are clear: (i) that *Morrissey* dictates that a "business trust" organized for the purpose of conducting an on-going business, dynamic in its interests, ownership and trustee-management, is an unincorporated business association regardless of its characterization as a "trust"; (ii) that *Bouligny* requires that for diversity purposes an unincorporated association—once it is properly so characterized—has as its citizenship the residence of each of its constituent members or interest holders; and (iii) application of "real party in interest" concepts under Rule 17(a) cannot be utilized to confer diversity jurisdiction by revising or ignoring the characterization of a party compelled by (i) and (ii) above. Applying the Supreme Court decisions to REIT's, each of the District Courts have properly concluded that the large, publicly-traded REITs lack the requirement of complete diversity where there are shareholders residing in the same state as the opposing party.

The opinion of the Court of Appeals quotes at some length the provisions of the promissory note from Rockwall Estates, Inc. payable to the individual Trustees and its commitment letter allegedly issued by Navarro to Rockwall Estates, Inc. Navarro, of course, is not alleged to be a party to the promissory note transaction and in any event, Navarro believes that the

terms of a contractual instrument between a third party and the Trustees could not serve to confer diversity jurisdiction on the federal court. More importantly, neither the promissory note nor the commitment letter are material in determining the status of FMI for diversity purposes.[13]

The provisions of the Declaration of Trust referred to in the opinion of the Court of Appeals should not be considered the determinative factor of FMI's status for federal jurisdictional purposes. In the dissenting opinion, Judge Vance cites the opinion of Judge James C. Hill, then a District Judge, in the case of *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975):

> "Stated simply, since the business trust has the status of an unincorporated association, its citizenship will control the issue of diversity even if the plaintiff were allowed to substitute the individual trustees as the named plaintiffs. The court is of the opinion that to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants. To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and

[13]Indeed, reference to the promissory note and commitment letter may only serve to further obscure the issue. The commitment letters (A. 17-22; A. 22-28) are apparently addressed to Rockwall Estates, Inc., a Texas corporation, not made a party to this suit. The promissory note (A. 9-16) although payable to the Trustees makes repeated reference to FMI as an entity (A. 14-15). The Assignment (A. 30-31) of the commitment letter purports to assign that instrument to FMI as opposed to the Trustees.

create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one trustee or two or fewer than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philsophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto uncovered broad categories of litigants it ought to be done by the Congress and not the courts." 405 F. Supp. at 595.

The majority's approach of determining diversity jurisdiction "on a case by case basis (there being no statutory model) to determine which class [of membership in the organization] has exclusive power to control and manage the trust" will, as pointed out by the dissenting opinion, lead to divergent results and an entire new body of jurisdictional precedents where none is necessary.

The Court's analysis limiting *Bouligny* to labor unions is illogical and not a fair reading of that case. To restrict the application of *Bouligny* to labor unions is to create a sort of "second-class citizenship" for such an association.

In summary, the opinion of the Court of Appeals in sustaining diversity jurisdiction constitutes the extension of that right to a class of litigants not heretofore contemplated by Congress and an open invitation to use artificial means to create subject matter jurisdiction which otherwise would not exist. The decision in this case overrules not only all prior decisions of the district

courts where the issue was squarely presented, but conflicts with the Third Circuit's opinion in *Riverside Memorial Mausoleum, supra*, and that of the Fourth Circuit in *Belle View Apartments v. Realty ReFund Trust, supra*, and the controlling precedents established in *Bouligny* and *Morrissey, supra.* It is respectfully submitted that the opinion of the panel majority is in error and should be reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States should reverse the judgment of the Court of Appeals and affirm the district court's dismissal of this case for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence Fischman, hereby certify that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been hand delivered to James A. Ellis, Jr., Carrington, Coleman, Sloman, Johnson & Blumenthal, 3000 One Main Place, Dallas, Texas, attorney for Respondents.

LAWRENCE FISCHMAN

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK AND JACK H. QUARITIUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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RESPONDENTS' BRIEF ON THE MERITS

Respondents are satisfied with Petitioner's reference to the prior decisions in this case and with its statement of the grounds on which the jurisdiction of this Court is based, but Respondents believe that this Court may or must construe additional constitutional and statutory provisions that were not mentioned in Petitioner's brief. In addition, Respondents totally disagree with Petitioner's statement

of the issue presented in this case. Consequently, the following additions and corrections to the pertinent parts of Petitioner's brief are necessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED

Article III, Section 2 of the Constitution, provides as follows:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

Section 1 of the Fourteenth Amendment to the Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . .

15 U.S.C.A. §78j(b) (1971) provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of

> interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

28 U.S.C.A. §1331 (Supp. 1979) provides as follows:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

ISSUES PRESENTED FOR REVIEW

This action was brought in a United States District Court by eight individuals (the plaintiff-individuals) who were all citizens of states other than Texas. They alleged that, as trustees of a Massachusetts business trust, Fidelity Mortgage Investors (FMI), they had entered into a business transaction involving Navarro Savings Association (Navarro), a Texas corporation with its principal place of business in Texas. This case or controversy arose out of that business transaction. Further, three of the plaintiff-individuals were beneficial shareholders in the business trust and brought this action alternatively on behalf of FMI and all owners of shares as provided in Rule 23.2 of the Federal Rules of Civil Procedure. The business trust, FMI, was not a party to the suit, and the plaintiff-individuals did not allege or assert jurisdiction based upon any fictional citizenship of such business trust. Contrary to the

statement by Petitioner Navarro, the only issue decided by the Court of Appeals and presented here is this:

IS THIS CASE OR CONTROVERSY BETWEEN THE PLAINTIFF-INDIVIDUALS ON THE ONE HAND AND NAVARRO ON THE OTHER A CIVIL ACTION "BETWEEN CITIZENS OF DIFFERENT STATES" OVER WHICH THE UNITED STATES DISTRICTS COURTS HAVE ORIGINAL JURISDICTION.

The plaintiff-individuals also alleged that the same facts constituted a violation of the Securities Exchange Act of 1934 and that the court therefore had federal question jurisdiction pursuant to 28 U.S.C.A. §1331 (Supp. 1979). Prior to the dismissal by the trial court, there was no factual development of the federal claims. Thus, another issue presented by the trial court record but *not* decided by the Court of Appeals nor presented to this Court is this:

DID THE U.S. DISTRICT COURT IMPROPERLY DETERMINE, WITHOUT ANY FACTUAL DEVELOPMENT OF THE FEDERAL CLAIM, THAT IT LACKED JURISDICTION.

STATEMENT OF THE CASE

A. Procedural Background

This case was originally brought in the United States District Court for the Northern District of Texas, Dallas Division, after it was determined that the venue in a similar state court action would be in Corsicana, Navarro County, Texas rather than Dallas, Texas.[1] The early pro-

[1]These same individuals in their own names as trustees first brought a similar action against Navarro and another person in the state district court in Dallas, Dallas County, Texas. When the change of venue ruling was entered, the individual plaintiffs sought and received an order of nonsuit in the state court and filed this case in the federal court. However, knowing where the venue of the state court action was placed, the defendant Navarro Savings Association filed a counterclaim against the plaintiff-individuals (not against the trust) in the state court seeking a declaratory judgment of nonliability on the same alleged facts. That counterclaim was removed to the United States District Court for the Northern District of Texas, where it remains on file pending the outcome of this appeal.

Dallas County, where the transaction took place, Navarro County, where the defendant was located, and Rockwall County, where the land was located, are all in the Dallas Division of the Northern District of Texas. 28 U.S.C.A. §124(a)(1)(1968).

cedural pleadings and motions make clear that the plaintiff-individuals apprehended local prejudice in the rural Texas state court in Corsicana, Navarro County, Texas and were seeking to exercise their right to choose instead a non-prejudicial federal forum for the trial of the substantive issues set out in their complaint. Navarro apparently had the same perception and vigorously opposed that choice of a federal forum.

In dismissing for want of jurisdiction the trial court assumed erroneously that FMI, the trust, was a party to the suit.[2] The Court of Appeals, in reversing, recognized

[2]The trial court erroneously stated the plaintiffs' contention as follows: "Plaintiffs primarily contend, in opposition to defendant's motion to dismiss, that when a real estate investment trust (REIT), such as FMI, brings suit in federal court, the citizenship of the trustees, not the beneficiaries, is the determinative factor for diversity purposes." 416 F.Supp. 1186 at 1187-88. Note that the trial court was also in error in assuming that FMI was a real estate investment trust, contrary to the uncontradicted affidavit of Arthur Milam, in which he stated that FMI had ceased to be a real estate investment trust on September 30, 1974. (A.-39). While the distinction probably is immaterial, the Petitioner in its brief makes the same erroneous assumption. See, *e.g.*, Petitioner's statement of the "issue presented for review" at page 3 of Petitioner's brief on the merits and similar erroneous references to FMI as "a real estate investment trust" at pp. 4, 13, and 19 of Petitioner's brief on the merits.

that FMI, the trust, had not been a party and that the only plaintiffs were eight individuals.[3]

Since the trust was not a party to the proceeding, the Court of Appeals found it unnecessary to create for it a fictional "citizenship". The Court determined from the terms of the Declaration of Trust, the provisions of the promissory note attached to the complaint naming the plaintiff-individuals as the payees, and the Federal Rules of Civil Procedure that the plaintiff-individuals were real parties in interest and that the diversity between their citizenship and that of the defendant Navarro conferred federal jurisdiction. 597 F.2d 421 at 425. The Court found it unnecessary, therefore, to review the alternative theory of diversity jurisdiction based upon a class action by some plaintiff-individuals as representative shareholders under the provisions of Rule 23.2. The Court further found it unnecessary to determine whether the trial court was correct in dismissing as to the federal question alleged without any evidentiary development of the federal law issues. 597 F.2d at 422.

There was no suggestion in any court below by motion, affidavit, or otherwise that the selection of the plaintiff-individuals as trustees for FMI had been improperly or collusively made for the purpose of conferring federal jurisdiction in the instant case or that there were other trustees who were citizens of the state of Texas. Any

[3]"Plaintiffs are eight individuals, all non-Texas citizens and trustees of Fidelity Mortgage Investors, a Massachusetts business trust (FMI), who filed this complaint as representatives of FMI seeking damages for breach of contract against defendant Navarro Savings Association, a Texas corporation. . . ." 597 F.2d 421 at 422. Further, "FMI is not a party to these proceedings. The trustees of the trust are the plaintiffs, all of whom are of non-Texas citizenship." 597 F.2d at 425.

suggestions by the Petitioner Navarro in its brief of any such improper invocation of federal jurisdiction are not supported by the record and are untrue.[4] Similarly, there was no suggestion in any court below, by motion or otherwise, that any of the plaintiff-individuals lacked capacity to sue or were not real parties in interest.

The plaintiff-individuals did stipulate orally that some beneficial shareholders of FMI were residents of the state of Texas; however, no attempt was made in the trial court to prove or stipulate the citizenship of any shareholders other than the plaintiff-individuals. The Court of Appeals in its opinion pointed out that the practical effect of Navarro's argument would be the denial of a federal forum in cases involving business trusts, due to the virtual impossibility of establishing the citizenship (presumably including facts of domicile, as well as birth

[4]Of course, if the trustees had been selected for the purpose of conferring federal jurisdiction, Navarro could have moved to have the suit dismissed for lack of subject matter jurisdiction in accordance with 28 U.S.C.A. § 1359. (1976) That section provides as follows:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

See McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1964) (court refused to uphold jurisdiction where guardian of minor was appointed solely to manufacture diversity jurisdiction).

or naturalization)[5] of all 9500 shareholders of FMI. 597 F.2d at 425.

B. Factual Background

The only facts in the record are those established by the complaint (the names of the parties to the action, A3, the jurisdictional allegations, A4-A5, the nature of the case or controversy, A5-A9, and the amount in controversy, A9); those established by the answer (the state of incorporation and state of principal place of business of the Defendant Navarro, A34 and the nature of the defenses asserted, A31-37); those established by the affidavit of Arthur Milam (the citizenship of the plaintiff-individuals, A38, and the content of the trust instrument of FMI, A39-A89); and those established by stipulation (that some shareholders of FMI resided in the state of Texas, A37).

Since the close of the record below, there has been a new development which this Court may consider significant and proper to mention in this brief. See *Fusari v. Steinberg,* 419 U.S. 379, 390-91 (1975) (Burger concurring). FMI no longer exists. Pursuant to a plan of reorganization approved and ordered by the Bankruptcy Court in the proceedings mentioned in the complaint (A4), FMI merged into Lifetime Communities, Inc., a Delaware corporation, on February 28, 1978, nineteen months after the district court rendered

[5]Diversity of citizenship, rather than diversity of residency, is the jurisdictional standard. Steigleder v. McQuester, 198 U.S. 141, 143 (1905). Citizenship is defined by the Fourteenth Amendment in terms of birth or naturalization within the United States and residency within a particular state. Despite the constitutional language of "residency", domicile in a state is a prerequisite to being considered a citizen of that state for diversity purposes. *E.g.*, Chicago & N.W.R. Co. v. Ohle, 117 U.S. 123 (1886).

its opinion and order. While the issue of jurisdiction apparently turns on the facts existent at the commencement of the action, *Louisville, N.A. & C.R. Co. v. Louisville Trust Co.,* 174 U.S. 552 (1899), in practical effect the claim of the plaintiff-individuals is now owned by a Delaware corporation which has its principal place of business in a state other than Texas.[6]

According to Section 1.3 of its Declaration of Trust, pertaining to the nature of the trust, FMI was a Trust "of the type commonly termed a Massachusetts business trust and shall *not* be a partnership, general or limited, joint venture, joint stock company, *association* or corporation". A45. (Emphasis added). Further, *"neither the Trustee nor the Shareholders,* nor any of them, *shall for any purpose be deemed to be,* partners or *members of an association."* A46. (Emphasis added). The principal purpose of the trust was the investment of trust assets in obligations secured by mortgages on real property or other rights or interests in real property. A46. It was the Trustees who had the power, control and authority over the trust estate and its business and affairs. A49-50. Among the specific powers granted to the Trustees were the powers to retain, invest, and reinvest the capital and funds of the trust, to invest in, purchase, or acquire notes, bonds, or other obligations secured by mortgage loans, to invest in loans secured by the pledge or transfer of mortgage loans, A50, to lend money, A51, to collect and sue for sums of money coming due to the trust, and to prosecute, join, defend, compromise, abandon or adjust, actions or suits or other litigation relating to the trust, the trust estate or the trust's affairs. A54.

[6]Fed. R. Civ. P. 25(c) nevertheless would allow the action to be continued by the plaintiff-individuals unless otherwise ordered.

The Trustees were expressly directed to invest the Trust Estate in real property, interests therein, "Securities of Persons involved in . . . financing or dealing in Real Property, . . . and Mortgage Loans of all kinds. . . ." A59. These investment categories expressly include, without limitation, various financing and security arrangements including "Standby Commitments [and] Gap Commitments" and "any other Real Property financing techniques which might be developed in the future." A59.

In the trial court there was no assertion that the participation by the plaintiff-individuals, as trustees, in the transaction out of which the controversy arose (whereby they acquired rights in a loan commitment of Navarro) was outside the express or implied powers of the trustees, *see* A31-37. There also was no assertion that their commencing the instant suit in their own names was in violation of any law or contrary to the provisions in the trust instrument that ***"the Trustees shall*** conduct and transact the activities of the trust . . . and *sue* and be sued in the name of the trust or ***in their names as trustees of the trust.***" A45 (Emphasis added).

As stated by the Court of Appeals

> [I]t is apparent that the general and specific powers relating to the management and control of the FMI trust repose in the eight trustees who are plaintiffs in this suit. The Declaration of Trust could not be more specific in this regard. Likewise, the Rockwall promissory note [an instrument material to the claim of the plaintiffs] was specifically made payable to the order of the eight trustees, plaintiffs herein, in their capacity as trustees of FMI under the Declaration of Trust.

597 F.2d at 425. In summary, it was pursuant to specific authority under the trust instrument that the plaintiff-individuals, in their capacity as trustees, entered into the business transaction out of which this case or controversy arose. The same eight individuals in their capacity as trustees were authorized by the same trust instrument to bring this suit in their own names as trustees, and they did so.

Further, however, if (contrary to the trust instrument) FMI was an unincorporated association of shareholders, as Navarro contends, nevertheless three of the plaintiff-individuals brought the action alternatively as representatives of FMI and all shareholders as specifically provided by Rule 23.2

LEGAL BACKGROUND AND MATTERS OF GENERAL KNOWLEDGE

The judicial power of the United States was extended by Art. 3, §2 of the Constitution to controversies "between citizens of different states." The drafters of the Constitution were of the opinion that such jurisdiction was necessary to the peace and tranquility of a union of several states because of the perception that a state court might be biased or prejudiced in favor of its own citizens. *See* A. HAMILTON, FEDERALIST PAPERS No. 80.

Whether pursuant to a constitutional duty, *see Martin v. Hunter's Lessee,* 1 Wheat. 304, 329 (1816), or merely a constitutional power, Congress must create the inferior tribunals and invest them with jurisdiction over the types of cases enumerated in Article III before the judicial branch can exercise jurisdiction over those matters. *Cary v. Curtis,* 3 How. 236, 245 (1845).

Congress has conferred the constitutional diversity jurisdiction upon United States district courts where the amount

in controversy is in excess of $10,000. 28 U.S.C.A. §1332 (1966 and Supp. 1979). The original judiciary act was construed to require "complete diversity" in cases involving multiple parties. *Strawbridge v. Curtiss,* 3 Cranch 267 (1806). That rule was a rule of statutory construction and not one of constitutional law. *State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523, 530-31 (1967).

Since the Constitution and statute referred to citizenship, a status attainable only by individual persons, application of the *Strawbridge* rule to suits by or against corporations at first presented this Court some metaphysical problems in determining diversity jurisdiction. The corporation was not like the trustee who was an individual citizen suing or sued in his own right (but for the benefit of his beneficiaries), who presented no metaphysical problems of citizenship. See, *Bank of the United States v. Devaux,* 5 Cranch 61, 91 (1809). Rather, because a corporation was viewed as merely an aggregate of individuals, this Court first decided that federal diversity jurisdiction was to be determined from the citizenship of the individual members of the corporation. *Id.* at 91-92.

About forty years later, after expressing its strong regret for the *Strawbridge* and *Devaux* decisions, *Louisville, C. & C.R. Co. v. Letson,* 2 How. 497, 555-56 (1844), this Court in *Marshall v. Baltimore & Ohio R.R.,* 16 How. 314 (1853) concluded the metaphysical debate that had persisted by creating a judicial fiction — a conclusive presumption or estoppel in equity that all shareholders of corporations were citizens of the state of incorporation. Consequently, for purposes of diversity, corporations were treated just as if they were citizens of the state in which they were incorporated. More than a hundred years thereafter Congress decided to limit diversity jurisdiction in suits by or against corporations and enacted a statute

deeming a corporation to be a citizen also of the state of its principal place of business. 72 Stat. 415, 28 U.S.C.A. §1332(c) (1966).

However, in *United Steelworkers v. Bouligny,* 382 U.S. 145 (1965), this Court refused to create a similar fiction for a labor union, stating as its reason the difficulty of formulating a rule for labor unions that would have the uniformity of application of the fiction it created for corporations. The Petitioner here says that "such fictions were tantamount to an expansion of diversity jurisdiction — a matter resting in the discretion of Congress alone." Presumably the judicial creation of a fiction that diminishes diversity jurisdiction would be, for the same reason, improper. In the instant case the creation of the double fiction advocated by Navarro — that the plaintiff-individuals as trustees or representative shareholders are not the plaintiffs but that the plaintiff is a business trust that is a citizen of Texas — would be both false and improper, particularly since the fiction's only purpose is to divest the court of jurisdiction.

The avoidance of local prejudice was the original purpose of diversity jurisdiction. *Bank of the United States v. Devaux,* 5 Cranch 61, 87 (1809), *see also Pease v. Peck,* 18 How. 595 (1856). Scholars have concluded that the existence of diversity jurisdiction and the perception that local prejudice could thereby be avoided has had a great impact upon the economic development of the South and West and fostered the original goal of the founders of developing and preserving a union, in the broadest sense, of the United States. *See, e.g.,* C. WRIGHT, LAW OF FEDERAL COURTS §23 at 91 (3rd ed. 1976) and cited authorities. The interstate investment, in the instant case, of funds of FMI, a Massachusetts business trust, in a real estate development loan in Rockwall County, Texas is precisely the type of invest-

ment that diversity jurisdiction has fostered. As previously demonstrated, it certainly was the apprehension of local prejudice in the state court that resulted in the filing of the instant case in federal court.

There are those who contend that Congress should abolish or at least minimize the diversity jurisdiction of the federal courts. It is common knowledge that bills having that effect are now pending in Congress and that the American Bar Association and state bar associations are opposing such bills. Proponents and opponents apparently would agree that the issue is one for Congress and not for this Court.

SUMMARY OF THE ARGUMENT

The first three points of argument by the plaintiff-individuals demonstrate that the trial court had diversity jurisdiction. The fourth point shows that the trial court erred in determining that it lacked federal question jurisdiction.

(1) The plaintiff-individuals are trustees and the real parties in interest whose citizenship is determinative of jurisdiction.

This action was brought only by the eight plaintiff-individuals who are trustees of an express trust, and under Rule 17(a) of the Federal Rules of Civil Procedure they are real parties in interest who could and did sue in their own names without joining the beneficiaries of the trust. A long line of authorities establish that the relationship of the trustees to the trust assets and to the lawsuit in question determines whether the trustees are the real parties in interest whose citizenship determines the existence of diversity jurisdiction. See, *Susquehanna & Wyoming Valley R. R. & Coal Co. v. Blatchford,* 11 Wall 172 (1870); *Dodge v. Tulleys,* 144 U.S. 451 (1892); and *Bullard v. City of Cisco,* 240 U.S. 179 (1933). Even if FMI is not an "express trust" within the contemplation of Rule 17(a), the plaintiff-individuals are still the real parties in interest whose citizenship determines diversity jurisdiction because the trustees were authorized to and actually did enter into the transaction at issue in their names, as trustees, and are further authorized to and actually did bring suit in their names without joining the beneficiaries. The real party in interest rule embodied in Rule 17(a) and implicit in both the constitutional and statutory diversity jurisdiction provisions is based upon the policy that civil actions should be brought by the person who is entitled to enforce the right in question so that the defendant is protected against a subsequent action by the party actually entitled to prosecute the suit. See, 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1543 at 643 (1971); and ADVISORY COMMITTEE ON CIVIL RULES, NOTE TO RULE 17(a), PROPOSED RULES OF CIVIL PROCEDURE 39 F.R.D. 84-85 (1966). Since under the FMI Declaration of Trust it is the trustees exclusively who are entitled to enforce the rights at issue, that policy is served by the Court of Appeals' determination that the trustees are real parties in interest.

(2) Alternatively this is a class action and the citizenship of the representatives is determinative of jurisdiction.

If FMI is not really a trust, and if otherwise the powers possessed by the individual plaintiffs as trustees thereof are insufficient to render them real parties in interest, an alternative ground for diversity jurisdiction is shown by the record. Three of the individual plaintiffs were shareholders of FMI and brought the action alternatively as a class action on behalf of FMI and all other shareholders, as provided in Rule 23.2 of the Federal Rules of Civil Procedure. A class action by representative members

is an appropriate means of bringing suit on behalf of an unincorporated association, and when suit is brought in this fashion it is the citizenship of the named representatives that is determinative of the diversity jurisdiction issue. *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1920). The adoption of Rule 23.2 in 1966 expressly sanctioned the use of the class action device by representative members of an unincorporated association, and was not designed to restrict in any way the previous availability of such action. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1861 at 456, 459; Cohn, The New Federal Rules of Civil Procedure, 54 GEO. L. J. 1204, 1227 (1966).

The trial court erred in holding Rule 23.2 of the Federal Rules of Civil Procedure inapplicable in Texas federal courts. Texas law, which Rule 17(b) makes applicable to determine capacity to sue, specifically allows representative members of unincorporated associations to sue or be sued in such a class action. Even if a suit by FMI as an entity had been attempted, Texas statutes allow a suit by an unincorporated association as an entity only in courts that have subject matter jurisdiction; thus, if it would divest the court of subject matter jurisdiction, a suit by FMI as an entity was not even allowed in Texas. On the other hand, if FMI was an unincorporated association, a class suit by representative shareholders was allowed. Thus, alternatively the diversity of citizenship between the representative shareholders as plaintiffs and the defendant Navarro established diversity jurisdiction.

(3) Any fictional "Citizenship" for FMI should be held to be in a state or states other than Texas.

Even if the Court should disregard the record and determine that this was actually a suit by FMI as an entity in its own name, an analysis of the controversy and the identity of the persons between whom it arose requires

a conclusion that this is a controversy between Navarro and the trustees who entered the transaction out of which the controversy arose. The shareholders, on the other hand, had no involvement whatsoever in the controversy, no legal right to be involved therein, and no right to control the litigation. Their only connection with the litigation was the possibility that a successful suit would ultimately result in higher dividends. The business trust in question is analogous to a limited partnership, with the trustees who control the business of the organization in a similar position to general partners. For purposes of diversity jurisdiction, it is the citizenship of the general partners that is determinative and the citizenship of limited partners should be ignored. *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 184 (2d Cir. 1966) (Friendly, J.), *cert. denied,* 385 U.S. 817 (1966).

Alternatively, if it is deemed that FMI as an entity was the plaintiff and a fictional citizenship must be attributed to it, the Court should follow the principle in *Marshall v. Baltimore & Ohio R.R. Co.,* 16 How. 314 (1853). In *Marshall* it was determined that the shareholders of a corporation should be conclusively presumed to be citizens of the state of incorporation and that, as a result, the corporation should be treated as a citizen of the state of its incorporation for purposes of diversity jurisdiction. In *United Steelworkers v. Bouligny,* 382 U.S. 145 (1965) this Court refused to create a similar fictional citizenship for a labor union because of the uncertainty as to which state would be appropriate for the fictional citizenship. However, the business trust has all the attributes of a corporation that lead to the decision in *Marshall;* FMI here is created under the laws of Massachusetts with its Declaration of Trust filed in the office of the Commonwealth of Massachusetts. A determination that a business trust has a fictional citizenship in the state in which and under whose

laws it was formed has the same certainty of application as is available for corporations. For the sake of uniformity with the treatment of corporations, perhaps a second fictional "citizenship" could be created in the state in which the trust has its principal place of business.

(4) The trial court had federal question jurisdiction and pendent jurisdiction.

The plaintiff-individuals alleged that their claims constituted fraud and deceit in connection with the purchase and sale of securities in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. §78j(b) (1970). Without any factual development of the underlying federal claim, the court dismissed the complaint for lack of jurisdiction. Such a summary treatment is appropriate only when the federal claim is wholly without merit and frivolous. Since the Fifth Circuit did not review the issue and the Petitioner Navarro did not raise such issue in its application for certiorari herein, if it becomes relevant the Court should determine that the trial court was in error in determining that the claim was frivolous or at least remand the case to the Court of Appeals for its consideration of the issue.

A commitment letter similar to the one received by the plaintiff-individuals has been held to be a security as a matter of law, *United States v. Austin,* 461 F.2d 724 (10th Cir. 1972). Similarly, a promissory note similar to the note received by the plaintiffs herein has been held to be a security. *McClure v. First National Bank of Lubbock, Texas,* 497 F.2d 490 (5th Cir. 1974) *cert. denied,* 420 U.S. 930 (1975). The note and commitment in connection with it were offered to the trustees of FMI as investors, and the maker of the note obtained investment assets with the proceeds of the note. The trial court erred in summarily dismissing the plaintiff-individuals' federal claim without any factual development.

ARGUMENT

The points of argument.

1. The plaintiff-individuals as trustees are the real parties in interest, and the diversity of citizenship between them and the defendant Navarro confers subject matter jurisdiction.
2. If the beneficial shareholders of Fidelity Mortgage Investors are the real parties in interest, the diversity of citizenship between the plaintiff shareholders, who bring this class action on behalf of FMI and all shareholders, and the defendant Navarro confers subject matter jurisdiction.
3. If the Court decides to assume, contrary to the record, that FMI sued as an entity and decides to create a fictional citizenship for FMI, any appropriate fictional citizenship would be in a state other than Texas.
4. The trial court erred in determining, without any factual development of the federal claim, that it lacked jurisdiction.

In any case in which plaintiffs assert subject matter jurisdiction because the case is an action "between citizens of different states", the analysis must begin with the most basic question: Who are the parties between whom the controversy exists? That is, who are the real parties in interest? It is well established that the citizenship of the real parties in interest determines whether the court has diversity jurisdiction. 3A Moore's Federal Practice ¶17.04 (2d ed. 1979); 6 Wright & Miller, Federal Practice and Procedure §1556 (1971).

The plaintiff-individuals contend that they, as the trustees of FMI, are the real parties in interest, and it is their

citizenship that is relevant to the determination of diversity. Alternatively, however, they assert that, if the trustees of the business trust are not real parties in interest, then it is the beneficial shareholders who must be the real parties in interest; and, since three of the plaintiff-individuals are beneficial shareholders and alternatively bring this action as representatives of the class of all shareholders, it is their citizenship that determines the existence of diversity. The first portion of the following argument supports the plaintiff-individuals' contention that the trustees are the real parties in interest. The second and third parts support their contention that, if they are mistaken, nevertheless the trial court still had diversity jurisdiction. The fourth part supports their alternative contention, not considered by the Court of Appeals, that the trial court had federal question jurisdiction.

I.

The plaintiff-individuals as trustees are the real parties in interest, and the diversity of citizenship between them and the defendant confers subject matter jurisdiction.

Rule 17(a) of the Federal Rules of Civil Procedure entitled "Real Party in Interest", provides as follows:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, *trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another,* or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; . . . no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest, and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(Emphasis added). The text of the rule was revised in 1966, as quoted above, to make clear that the specific enumeration of real parties in interest is merely illustrative of the various applications of the principles of the real party in interest rule. See Advisory Committee On Civil Rules, Note To Rule 17(a), Proposed Rules Of Civil Procedure, 39 F.R.D. at 84 (1966).

FMI was a Massachusetts business trust formed by an express declaration of trust. On its face, this business trust falls within the mention of an "express trust" in Rule 17(a). The relationship of the Trustees to the beneficiary-shareholders was created *expressly* by a written document and not through implication or equitable creations such as constructive trusts[7] or resulting trusts. It would appear that the phrase in Rule 17(a) that "trustees of an express trust" are the real parties in interest is a codification of the following decisions to that effect.

In *Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford,* 11 Wall. 172 (1870), the Supreme Court examined the relationship of the plaintiff trustees to the suit in order to determine whether their residence governed the existence of diversity jurisdiction.

> In the case at bar the plaintiffs [trustees] are the real prosecutors of the suit. They are parties to the mortgage contract, negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees

[7]See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 268, 269 (2d Cir. 1944).

> are reserved, and to them the usual obligations of the mortgagors are made. The right to use different remedies is expressly provided upon default in the payment stipulated, and the adoption of either rests at the option of the plaintiffs. So long as they do not refuse to discharge the trust reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them.

Id. at 178.

Later, in *Dodge v. Tulleys,* 144 U.S. 451 (1892), a case involving the foreclosure of a deed of trust, this Court again looked to the citizenship of the trustee:

> The suit is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was, therefore, the proper party in whose name to bring the suit for foreclosure. It happens in this case that there was but one party beneficiary under the trust deed; but it often is the case, as in railroad trust deeds, that the beneficiaries are many. But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that the beneficiary in a trust deed may be a citizen of the same state as the opposing party in the litigation, would not, if the trustee is a citizen of a different state, defeat the jurisdiction of the federal court.

Id. at 455.

In *Bullard v. City of Cisco,* 290 U.S. 179 (1933), the issue was whether the trustees for the bond holders of municipal bonds should be considered the real parties to the suit, because no individual bond holder held an interest

sufficient to meet the minimum federal jurisdictional amount. In a detailed analysis of the trust agreement, this Court noted that the trustees had been vested with full legal title to the negotiable bonds transferred to them, together with the right to collect on them and otherwise exercise full control and authority. The Court held:

> As the transfers under which the plaintiffs held the bonds and coupons were made to them as trustees, were real and not simply for purposes of collection, and invested them with the full title they were entitled, by reason of their citizenship and of the amount involved, to bring the suit in the federal court. The beneficiaries were not necessary parties and their citizenship was immaterial.

Id. at 190. See also, *e.g., Curb and Gutter Dist. No. 37 v. Parrish,* 110 F.2d 902 (8th Cir. 1940); *Allen-West Commission Co. v. Brashear,* 176 F. 119 (Cir. Ct. E. D. Ark. 1910).

The principle of these and other decisions is this: The relationship of the trustees to the trust assets and to the lawsuit determines whether the trustees are real parties in interest and, hence, whether their citizenship determines the existence of diversity. In many of the trust cases the courts found significant the fact that the trustees had actual legal title (as opposed to equitable title) to the trust assets and that they possessed the authority to prosecute and control litigation relating to such assets. In the instant case the plaintiff-individuals, as trustees, have such authority and control. See Article III of the Declaration of Trust, "Trustees' Power." A49-56. In addition to the broad grant of power, the Declaration of Trust commands the trustees to "conduct and transact the activities of the trust, make and execute all documents and instruments, and

sue and be sued in the name of the trust or in their names as trustees of the trust." A45. In the transaction at issue, they are the named payees of the $850,000 note. A10-16.

Although no federal appellate decision has been found applying those principles to a trust agreement exactly like the business trust in the instant case, the foregoing analysis of similar fiduciary relationships indicates clearly that the plaintiff-individuals, as trustees, are the real parties in interest whose citizenship governs for diversity purposes.

Texas courts have so held. In *Houston Oil Co. of Texas v. Village Mills Co.*, 241 S.W. 122 (Tex. Comm'n App. 1922, holding approved), the court analyzed the Texas Pine Land Association and held that it was

> not a partnership, but a trust estate, represented by three trustees, authorized to handle the property generally, and to sue, prosecute, and defend suits in their capacity as trustees, without joining the cestui que trust or stockholders; that the said trustees were properly before the [federal] court [in an earlier suit claimed to be an estoppel] in their said representative capacity; that the records showed that such trustees had the requisite diversity of citizenship; and that the federal court thereby had jurisdiction.

Id. at 125.

The trial court in the instant case erred because it sought the answer to the wrong question. It apparently analyzed the case by asking, "What should be considered the fictional citizenship of a business trust who sues or is sued as an entity?" The question it should have asked is this: "Are the plaintiff-individuals, who brought this action in their capacity as trustees, real parties in interest?" That is, "Is this a controversy between them and the defendant?" Proper analysis includes a consideration of the following

principles of the real party in interest rule, and the express provisions of Rule 17(a).[8]

The real party in interest rule effectively means "that the action must be brought by the person who, accordingly to the governing substantive law, is entitled to enforce the right." 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1543 at 643 (1971). The object of the real party in interest rule was stated in the Advisory Committee Note to the 1966 amendment to the rule:

> The modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.

39 F.R.D. 84-85 (1966). A review of the FMI Declaration of Trust reveals that it is the trustees exclusively who are entitled to enforce the rights at issue. As expressly stated in Article 3.2(r) of the Declaration of Trust, the trustees have the absolute right:

> ... to collect, *sue for and receive* all sums of money coming due to the Trust, and to *prosecute join, defend, compromise, abandon, or adjust, any actions, suits, claims, demands or other litigation* relating to the Trust, the Trust Estate or the Trust's affairs.

A54 (Emphasis added). They had the absolute right to invest the capital and funds of the trust, to lend money,

[8]Although the issue here is the jurisdictional question of whether this is a civil action "between citizens of different states," and the Federal Rules of Civil Procedure do not themselves extend or limit jurisdiction, Rule 82, nevertheless, the "real party in interest" concept in Rule 17(a) appears identical to the jurisdictional "real party in interest" concept. See Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 TEXAS L. REV. 243, 250-51 (1978).

and to possess and exercise the rights incident to the ownership of mortgage loans, as expressly provided in §§(a), (b), (c), (g), and (k) of Article 3.2 of the Declaration of Trust. A50-52. They were payees of the note incorporated in their complaint in the instant case. A10. They had the power to hire such managers and agents as they deemed to be necessary, as provided in Article IV, but they remained responsible for the general policies and supervision of the business of the trust. On the other hand, the shareholders' powers are very limited. They have the right to elect and remove trustees (Article 2.2), elect new trustees and approve any sale or other disposition of more than fifty percent of the trust estate (Article 6.7). A47, A66-68. Article 6.2 entitled "Rights of Shareholders" states in part:

> These shareholders shall have no legal right, title or interest in or to the trust estate and shall have no right to a partition thereof during the continuance of the trust. . . . Except with respect to matters in which the shareholders are specifically given the right to vote by this Declaration, no action taken by the shareholders at any meeting shall in any way bind the Trustees.

A64.

Who, then, are the real parties in interest whose citizenship determines diversity jurisdiction — the trustees or the shareholders? It still appears that the plaintiff-individuals in this action are the trustees of an express trust as mentioned in Rule 17(a); but even if FMI is not "an express trust" within that phrase of the rule, then its trustees are, at least, "parties with whom or in whose name a contract has been made for the benefit of another" as also provided in the rule. But, even if they fail to fit precisely within one of the illustrative examples provided in Rule 17(a), they are nevertheless the real parties in interest for purposes of

diversity jurisdiction. It is they who own the legal rights at issue, and it is they who alone possess the contractual and legal authority and capacity to bring this action to assert those rights. It is their presence, in their capacity as trustees, that is necessary to protect the defendant against any subsequent action on the same issues and to insure that the judgment in this case will have proper effect as res judicata.

It is the named plaintiff-individuals, as trustees, who are the real parties in interest and whose citizenship determines diversity jurisdiction.

II.

If the beneficial shareholders of FMI are real parties in interest, the diversity of citizenship between the three plaintiff-individuals, who were shareholders representing the trust and all shareholders, and the defendant confers subject matter jurisdiction.

Plaintiff-individuals believe that the Court should consider FMI to have been exactly what it was — a Massachusetts business trust organized as its Declaration of Trust provides. Navarro's extensive reliance upon *Morrissey v. Commissioner,* 296 U.S. 344 (1935) is misplaced. That opinion adds nothing to the analysis of this case. There, the question was whether a business trust should be taxed as a corporation under a statutory provision defining a corporation, for tax purposes, as including "associations, joint stock companies and insurance companies." This Court merely held that, because of the trust's business purpose, the statute had expressed a Congressional intent that the business trust be taxed. There is absolutely no indication that this Court was there holding that all busi-

ness trusts would be considered identical to unincorporated associations for diversity jurisdictional purposes or any other purposes.

Even if the trust instrument's explicit description of the trust as a trust, and not an association, were given no weight, and even if FMI is for jurisdictional purposes an unincorporated association, and the trustees' role in its affairs does not render *them* the real parties in interest, nevertheless the plaintiff-individuals followed a clearly established alternative method for invoking diversity jurisdiction. Anticipating that the trial court might consider FMI to be an unincorporated association of its shareholders, the plaintiff-individuals chose, alternatively, one of the three available methods for bringing suit by or against an unincorporated association. The three alternative methods available at the choice of the plaintiffs were (1) an entity suit, (2) a suit by or against all members of the association, and (3) a class action suit by or against representative members. See generally, 7A WRIGHT & MILLER *supra*, §1861 at 451-52, 454-60 (1972). Three of the plaintiff-individuals were shareholders of FMI, and they chose alternatively to bring this as a class action on behalf of all 9,500 shareholders.

The Court of Appeals did not reach this issue, 597 F.2d 421 at 422. The only reason stated for the trial court's denial of diversity jurisdiction on this alternative theory was that since Texas law allowed FMI to bring an entity suit, Federal Rule 23.2 was not applicable in Texas. The trial court both misconstrued Texas statutory law and ruled contrary to the intents and purposes of Rule 23.2, the policy on the uniformity of procedure sought by the Federal Rules, and the goals and express provisions of diversity jurisdiction.

Rule 17(b) generally governs the capacity of a party to sue, and it refers to the law of the forum state in determining the capacity of an unincorporated association to sue in its name as an entity. Texas statutory law does permit such a suit by an association *only where the court has subject matter jurisdiction.*[9] But such a suit, where permitted, is not required.[10]; and the three plaintiff-individuals who were shareholders also had the option to sue as representatives of FMI and the other shareholders under the provisions of Rule 23.2. See *Oskoian v. Canuel,* 269 F.2d 311 (1st Cir. 1959), (where the Rhode Island law permitted but did not require suits by or against unincorporated associations as entities, and the federal class action option was held available). The right clearly had existed to bring such a "true" class action under Rule 23, *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 148 F.2d 403 (4th Cir. 1945). In *Chase Manhattan Mortgage & Realty Trust v. Pendley,* 405 F. Supp. 593 (N.D.Ga 1975), a case cited throughout the Petitioner's brief, the Court recognized the availability of a class action in cases such as this, stating: "The class action has apparently become a well established device for creating diversity jurisdiction so as to escape the strictures of [a rule that an

[9] "Any unincorporated joint stock company or association, whether foreign or domestic, doing business in this State, may sue or be sued *in any court of this State having jurisdiction of the subject matter* in its company or distinguishing name; and it shall not be necessary to make the individual stockholders or members thereof parties to the suit." TEX. REV. CIV. STAT. ANN. art. 6133 (Vernon 1970). (Emphasis added.)

[10] "The provisions of this chapter [which include Article 6133] shall not affect nor impair the right allowed unincorporated joint stock companies and associations to sue in the individual names of the stockholders or members, nor the right of any person to sue the individual stockholders or members." TEX. REV. CIV. STAT. ANN. art. 6138 (Vernon 1970).

association has a fictional citizenship in every state where a member is a citizen]." *Id.* at 596.

Texas common law allows suit by representative members of an association on behalf of all. See *Davis v. Hudgins,* 225 S.W. 73, 76 (Tex. Civ. App. — Dallas 1920, no writ). Rule 42 of the Texas Rules of Civil Procedure also granted representative members of an unincorporated association the right to bring a class action. Such rule prior to its amendment in 1977 was identical to the relevant provisions of Rule 23 of the Federal Rules prior to its amendment in 1966. It was well established prior to that amendment that the "true" class action by representative members was an appropriate vehicle for a suit involving an unincorporated association; and the citizenship of *only* the representative members and the adversary would determine diversity jurisdiction in such a suit. See *Smith v. Swormstedt,* 16 How. 288 (1853); *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921); see also, 7A WRIGHT & MILLER, *supra,* §1861 at 457; ADVISORY COMMITTEE ON CIVIL RULES, NOTE TO RULE 23.2, PROPOSED RULES OF CIVIL PROCEDURE, 39 F.R.D. 108 (1966).

Thus, even if *Morrissey v. Commissioner,* 296 U.S. 344 (1945) means that FMI was an association and not a business trust, nevertheless its representative shareholders had the capacity and the right to bring a federal class action and invoke diversity jurisdiction. FMI was not required (and perhaps not even permitted) to sue in federal court in the instant case in its own name. Of course, it did not choose even to try to sue as an entity.

Neither Rule 23.2, which became effective July 1, 1966, nor the Advisory Committee Notes indicate that the adoption of that rule was intended to limit the earlier practice; and, in fact, by citing *Tunstall* and *Oskoian,* mentioned

above, the Advisory Committee apparently approved the prior practice. See 39 F.R.D. at 108-09. Other authorities indicate that Rule 23.2 does not restrict the availability of a class action. See Cohn, The New Federal Rules of Civil Procedure, 54 GEO. L. J. 1204, 1227 (1966); 3B MOORE, *supra* §23.2 (1979); 7A WRIGHT & MILLER, *supra,* §1861 at 456, 459 (1972). It would seem then, that Rule 23.2 was designed to streamline the class action device for representative members of unincorporated associations, whose organization makes unnecessary some of the safeguards provided for the more "hybrid" or "spurious" class actions under Rule 23, as amended.

In summary, if FMI was an unincorporated association rather than a trust, and if despite their lack of control of its business or litigation its shareholders are therefore the real parties in interest, Rule 23.2 was nevertheless a method clearly available for representative shareholders to bring this action on behalf of the trust and all such shareholders. Rule 17(b) does not restrict or prevent the availability of such a class action. Texas law allows a suit by such association as an entity only in a court having jurisdiction of the subject matter. It merely permits such a suit, or a class action if the plaintiffs so choose, and it does not require suit by an association as an entity. Particularly where the state law does not require suit by or against an association as an entity, Rule 23.2 class actions on behalf of its members remain available. For this alternative reason the Court of Appeals correctly reversed the trial court's denial of diversity jurisdiction.

III.

If the Court decides to assume, contrary to the record, that FMI sued as an entity and decides to create a fictional citizenship for FMI, any appropriate fictional citizenship would be in a state other than Texas.

It is necessary to judicially create a fictional citizenship for FMI, as sought by Navarro, only if (1) the plaintiff-individuals who brought this action are not real parties in interest, either as trustees of the business trust or as representative shareholders in that trust, (2) Texas law conferred on FMI the capacity to sue as an entity in federal court, and (3) despite the form of the pleading and other court papers, this is really a suit by FMI as an entity. To even consider the Petitioner's point, therefore, involves circular reasoning. Because an entity suit is allowed by Texas statute only where there is subject matter jurisdiction, an assumption that this is such an entity suit precludes further inquiry into subject matter jurisdiction.

However, even if this logic is escapable, in creating that fictional citizenship for that fictional plaintiff FMI, this Court should carefully consider the constitutional and historical purposes and effect of diversity jurisdiction together with the peculiar facts in this case.

The only issue is whether this is a controversy "between citizens of different states", and in deciding this issue, the Court should analyze the controversy itself and the identity of the persons between whom it arose.

As reflected in the complaint, this controversy arose when the plaintiff-individuals, as trustees, lent $850,000 to Rockwall Estates, Inc. and received as part of the documentation and security therefor oral representations from the president of Navarro Savings Association and the assignment of written commitment letters of Navarro. One of the commitment letters expressly refers to the specific loan to Rockwall Estates, Inc. and provides that if the commitment is pledged as security therefor, the holder of the loan could require Navarro to make an $850,000 loan to Rockwall Estates, Inc. if Rockwall had been delinquent

for more than 60 days in the payment of installments due on the loan. A27. According to the complaint, when Navarro failed to honor that commitment, and breached its obligations thereunder, the plaintiff-individuals as trustees, suffered damages for which they seek recovery.

That is the nature of the controversy. No shareholder, in his capacity as a shareholder, is alleged to have had any knowledge or involvement in the transaction. No shareholder, in his capacity as such, is alleged to have any specific rights to the damages sought; the only connection whatsoever between the shareholders and that controversy is the indirect result that the trust estate under the control of the trustees was diminished by the results of the transactions, and the possibility of an effect upon some later decision of the trustees in their discretionary declaration of dividends or distributions under Section 6.5 of the trust instrument. A66. Of course, the shareholders had no legal right, title or interest in or to the trust estate and had no right to a partition thereof during the continuance of the trust. See Section 6.2 at A64. Any connection between the shareholders, as such, and the transaction at issue and the legal rights flowing therefrom was extremely remote.

Of similar remoteness was any connection between the 9,500 individual shareholders, as such, and the civil action resulting from that transaction. In fact, it is difficult or impossible to imagine any knowledge or participation that any shareholders, as such, would reasonably be expected to have concerning the litigation. On the contrary, the litigation and all decisions in connection with it were expressly and exclusively within the control of the plaintiff-individuals, as trustees. The shareholders had no right to participate in any decisions concerning the litigation.

Thus, if the Court considers the nature of the controversy and the parties thereto, in determining a fictional citizenship for FMI in this case, it would be most logical and proper to conclude that this is a controversy between citizens of different states. That is, at least in this controversy, FMI should have a fictional citizenship only in the states of citizenship of its trustees.

This approach is consistent with that followed by the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 184 (2d Cir. 1966) (Friendly, J.), *cert. denied*, 385 U.S. 817 (1966). In that case the plaintiff was a Delaware corporation with its principal place of business in Pennsylvania and the named defendant, Bache & Co., was a limited partnership organized pursuant to the New York partnership law and engaged in securities brokerage in New York City. At least one limited partner was a citizen of Delaware, but there was diversity between the plaintiff and all the general partners. Judge Friendly reasoned that the identity of citizenship between the plaintiff and one limited partner was not fatal to diversity and that the suit against the partnership must be considered to be against the general partners only. *Id.* at 183-84. Although this Court had decided *United Steelworkers v. Bouligny* less than four months earlier, it denied certiorari. 385 U.S. 817 (1966).

The Fifth Circuit Court of Appeals in the instant case expressly agreed with the reasoning of Judge Friendly and held that FMI, the business trust, is analogous to the limited partnership in that case. The Court stated that the citizenship of the shareholders should be disregarded in the same manner. Further, the Court of Appeals correctly affirmed that the result in that case, far from expanding diversity jurisdiction, was an application of the principle underlying the diversity jurisdiction decisions rendered

over the course of more than a century. 597 F.2d at 426, citing with approval Comment, Limited Partnership and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384 (1978). If this persuasive reasoning were followed by this Court, in creating a fictional citizenship of FMI only in the state or states where all its trustees are citizens, an affirmance of the Court of Appeals would follow.

A perhaps equally persuasive analysis — and clearly a more practical and useful result — in a similar situation was made by this Court in *Marshall v. Baltimore & Ohio R.R. Co.*, 16 How. 314 (1853). There, the Court recognized that, in a certain sense, a corporation is an artificial person intangible and indivisible, but that a citizen who has had a transaction with and has a "controversy" with a corporation may say with equal truth that he dealt with natural persons as the legal representatives of numerous unknown other persons. This Court reasoned that the necessities and convenience of trade and business require that stockholders act through officers and other representatives of the corporation, and that the state-conferred right to conduct business in such manner should not deprive their opponents of a federal forum with diversity jurisdiction. The Court then created a presumption and an estoppel to deny that the stockholders using the corporate vehicle are domiciled where the corporation was formed, stating:

> If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different state, to deprive citizens of other states, with whom they have controversies, of this constitutional privilege, and compel them to resort to state tribunals in cases in which, of all others, such privilege may be considered most valuable . . . the right of choosing an

> impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every state. It is of importance also to corporations themselves that they should enjoy the same privileges, in other states, where local prejudices or jealousy might injuriously affect them.

Id. at 328-29. The historical refusal of this Court to follow the reasoning in *Marshall* with regard to other business organizations is the only impediment to this Court's applying that reasoning in the instant case. Unlike the labor union in *United Steelworkers v. Bouligny,* 382 U.S. 145 (1965), where the Court cited the difficulties in fashioning a test for a state of "citizenship" for a labor union, the business trust in question is for all practical purposes of jurisdiction identical to the corporation in *Marshall.* Indeed, as Navarro points out in its brief, the trust instrument provides that:

> To the extent that the nature of this trust will permit, the duties and liabilities of trustees and officers shall be the same as the duties and liabilities of directors and officers of a Massachusetts corporation.

A77.

As the Court said in *Bouligny,* 382 U.S. at 152:

> Extending the jurisdiction to a corporation raised no such problem [of ascertaining the proper state for such citizenship], for the State of incorporation was a natural candidate, its arguable irrelevance in terms of the policies underlying the jurisdiction being outweighed by its certainty of application.

That same certainty applies equally to suits involving a business trust like FMI.

Navarro in its brief at page 31 argues strenuously for a rule of fictional citizenship that would be simple and easy to apply. But its suggested rule — that the citizenship, including domicile, birth, and naturalization, of all 9,500 shareholders of FMI should be examined to determine diversity jurisdiction — fails to meet its own criteria. Further, as the Court of Appeals noted, its practical effect for large modern business trusts would be exactly contrary to the policy of diversity jurisdiction, as the above quotation from the opinion in *Marshall* so persuasively demonstrated. The rule suggested by the plaintiff was properly rejected by the Court of Appeals herein because it would deny a federal diversity forum to all such trusts and all their adversaries. 597 F.2d at 425.

Thus, if a fictional citizenship of FMI is to be created, it should be in the commonwealth of Massachusetts, where FMI's Declaration of Trust was filed and under whose laws it was formed. There is no reason, logic, or precedent to prevent this Court from following the same practical understanding of diversity jurisdiction in suits by or against business trusts as entities that it has followed in suits involving corporations for over 135 years. Of course, if congressional intent were so construed, and for the sake of uniformity with the treatment of corporations, a second "citizenship" could be deemed to exist where the trust has its principal place of business.

The creation of a fictional citizenship in all of the 50 states where shareholders are citizens, so as to practically deny diversity jurisdiction in all controversies involving business trusts as plaintiffs or defendants, is inconsistent with the purposes and history of the diversity jurisdiction.

The principle (and almost the exact words) in the often quoted sentence from the opinion in *Bouligny* is applicable to the argument by the petitioner Navarro: However appealing such argument may be to opponents of diversity jurisdiction, they should be addressed to an appropriate forum, and pleas for contraction of the diversity jurisdiction from hitherto included broad categories of litigants ought to be made to the Congress and not the courts. See *United Steelworkers v. Bouligny,* 382 U.S. 145, 150-51.

IV.

The trial court erred in determining, without any factual development of the federal claim, that it lacked jurisdiction.

The plaintiff-individuals alleged that their claims constituted, by the use of interstate commerce and the mails, fraud, untrue statements and deceit in connection with the purchase and sale of securities in violation of 15 U.S.C.A. §78(j)(b)(1971) and that the court had jurisdiction under the provisions of Title 28, U.S.C. §1331, along with pendent jurisdiction over the state law claims. A4-5. They proceeded to allege, in several paragraphs, specific facts they intended to prove. A5-31.

The only record before the trial court was comprised of the pleadings and motions and the affidavit by Arthur Milam, as defendant Navarro presented no affidavits, depositions, testimony, or other evidence in support of its motion to dismiss.

Based on this record, however, the trial court dismissed plaintiffs' federal claim, stating "plaintiffs have alleged no facts in support of this claim, and perhaps rightly so, since it has absolutely no merit." Apparently the trial court was holding that the federal claim by plaintiffs was not

"substantial." See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE §3564 (1975).

The Court of Appeals did not review the issue. If this Court should determine that diversity jurisdiction was lacking, the issue of federal question jurisdiction must be decided by this Court or the Court of Appeals.

The trial court apparently based its decision upon its conclusion that the defendant's commitment letter is not a "security." 416 F.Supp. 1190-1191. However, the cases it cited do not support this conclusion. *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975), has no relevance to that proposition; Mr. Justice Powell, beginning the opinion of the court, stated the issue in this manner:

> The issue in these cases is whether shares of stock entitling a purchaser to lease an apartment in Co-op City, a state subsidized and supervised non-profit housing cooperative, are 'securities' within the purview of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Id. at 840. The transactions giving rise to plaintiffs' claim in the instant case are in no way analogous.

The trial court also mentioned in a "c.f." citation after its proposition that a commitment letter is not a security, *United States v. Austin,* 462 F.2d 724 (10th Cir. 1972). That case directly refutes the proposition for which the trial court cited it. It was a criminal case in which the government had secured a conviction on charges of securities fraud, among others. The indictment alleged that a loan commitment letter, which was a backup commitment guaranteeing the making of a loan by others (quite similar to the commitment letters in the instant case) *was* a security. The trial court there had instructed the jury that

the letter of commitment was a security, as a matter of law, and the Court of Appeals affirmed that ruling. It stated as follows:

> It is true that the letter of commitment is not an indicium of debt in the same sense as is a promissory note, but as used in the Securities Act, no such restriction is appropriate. In last analysis, this letter of commitment was sold for a substantial consideration, and the buyer received what appeared to be an enforceable obligation which contemplated the flow of funds. It indicated a binding and legal enforceable right. Therefore, *we can find no fault with the ruling of the trial court insofar as it regarded the letter of commitment as plainly being a security.*

Id. at 736 (Emphasis added).

The only other authority cited by the trial court was *Bellah v. First Nat'l Bank of Hereford,* 495 F.2d 1109 (5th Cir. 1974). Referring to the "commercial-investment dichotomy" for determining whether a promissory note is a security, the Fifth Circuit there stated its conclusion: "We merely hold that notes issued in the context of a commercial loan transaction fall beyond the purview of the act." *Id.* at 1114. The court also held that a certificate of deposit was not a security.

In *McClure v. First National Bank of Lubbock, Texas,* 497 F.2d 490 (5th Cir. 1974), *cert. denied,* 420 U.S. 930 (1975), the same court elaborated on the dichotomy between investment and commercial notes as follows:

> The cases excluding certain notes from the coverage of the act generally involved underlying transactions between payor and payee which were not of an investment nature [citing *Bellah, supra,* and other cases] ...

> On the other hand, where notes have been deemed securities within the meaning of the Securities Law, either of two factors, not present here, usually indicated the investment overtones of the underlying transactions.

Id. at 493. The first of those factors was whether the notes were offered to some class of investors or acquired by an entity for speculation or investment. *Id.* The second factor was whether the maker of the notes obtained investment assets, directly or indirectly, in exchange for its notes. *Id.* at 494. In the latter category, the court cited *Rekant v. Desser,* 425 F.2d 872 (5th Cir. 1970), summarizing its facts as "real estate corporation issued note and stock to obtain land for subdivision." *Id.*

In *Exchange National Bank of Chicago v. Touche Ross & Co.,* 544 F.2d 1126 (2d Cir. 1976) the court reviewed extensively the question of whether notes are "securities" under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. §78(j)(b)(1971) and Rule 10b-5. In affirming the trial court's federal question jurisdiction over the securities fraud claim, the court examined the leading cases on the subject, including those mentioned above. In arriving at a valid general standard, it resorted finally to the actual language of the 1934 Act, holding that a party asserting that a note of more than nine months maturity is not within the 1934 Act has the burden of showing that the context of the transaction requires that conclusion. Thus, the Second Circuit invoked the statutory presumption that a note of more than nine months maturity is a "security".

For applying that test, the court stated that:

> When a note does not bear a strong family resemblance to these examples [consumer financing note, home

> mortgage note, short-term secured note financing small business, "character" bank loan to customer, short-term note secured by accounts receivable or note formalizing open account] and has a maturity exceeding nine months, Section 10(b) of the 1934 Act should generally be held to apply.

Id. at 1138.

Applying those principles to the instant case, the allegations are quite clear that, for valuable consideration, the plaintiff-individuals, as trustees of FMI, received a two year promissory note, A10-16, payable to them as trustees, A10, and specifically referring in its final sentence, A16, to the commitment by Navarro, which had been long contemplated as part of the transaction. A29-30. They also received and were assigned by the maker of that note, A30-31, the same commitment of defendant Navarro, A23-29, which, in effect, was a back-up commitment guaranteeing to the trustees that in the event of a 60 day delinquency Navarro would make the loan to Rockwall Estates, Inc. The commitment specifically contemplated its being assigned or pledged to secure the loan being made. A27-28. Thus, it seems clear under controlling authorities that, in the transaction at issue herein, the trustees were the purchasers of securities. At least, their federal claim is not "insubstantial", and the trial court must hear all of the evidence before deciding the merits.

It should be pointed out that Fidelity Mortgage "Investors" is an "investment" trust whose own establishing document, the Declaration of Trust, declares its purpose as follows:

> The principal purpose or business of the Trust shall be to *invest* the assets of the trust in notes, bonds,

> or other obligations secured by mortgages on real property or rights or interests in Real Property.

A46. (Emphasis added). The first of the specific powers of the trustees is "to retain, invest and re-invest the capital and funds of the Trust in any property, real, personal, or otherwise, tangible or intangible, whether or not such property is authorized by law for investment by trust funds." A50.

Both the factors mentioned by the Fifth Circuit in *McClure, supra,* suggesting that particular loans were securities, are present in the instant case. The note payable to the trustees was acquired for speculation or investment, pursuant to the express purpose of FMI; and Rockwall Estates, Inc. was to develop investment assets, namely land for a subdivision, with the proceeds of its note payable to the trustees. See *Rekant v. Desser,* 425 F.2d 872 (5th Cir. 1970).

Moreover, if the trial court was correct in holding that it was the shareholders of FMI that were the real parties in interest, then they clearly were the purchasers of securities. Although, as explained in earlier parts of this brief, the plaintiff-individuals as trustees think they were the real parties in interest (since the only connection that individual shareholders had with this transaction was their purchase of their shares), nevertheless the trial court's holding in this regard logically leads to the conclusion that it is "investors" who are the real parties in interest. Even the trial court acknowledged that "FMI is an *investment vehicle* authorized to issue negotiable shares for public offering." 416 F.Supp. at 1188 (Emphasis added). The shareholders are the purchasers of these negotiable shares offered to the public for investment. Thus, even if the shareholders rather than the trustees were the real parties in

interest, the shareholders are clearly "investors" who are entitled to the protection of the federal securities laws.

The plaintiff-individuals have clearly alleged a federal claim. Whether they are entitled to recover on that claim depends on an interpretation of the federal laws as applied to the facts to be developed in a trial. The right of the plaintiff-individuals to recover on the claim will be sustained if the laws of the United States are given one construction, and will be defeated if they are given another. The Court thus has federal question jurisdiction. *Bell v. Hood,* 327 U.S. 678, 685 (1946). The only possible ground upon which the trial court could dismiss this federal claim was that, to a legal certainty, it was wholly insubstantial and frivolous. See *Id.; Grabinger v. Conlisk,* 320 F. Supp. 1213 (N.D.Ill. 1970), aff'd 455 F.2d 490 (7th Cir. 1972). See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE §3564 at 426-430 (1975).

The trial court was in error when it stated that the plaintiffs "have alleged no facts in support of this [federal] claim, and perhaps rightly so, since it has absolutely no merit." It did not have before it a sufficient record upon which to determine the case on the merits, but the pleadings contain all the allegations necessary to assert the federal claim, or at least to give notice of it. One of the cases the trial court cited held that, as a matter of law, a loan commitment was a "security". The trial court cited no authority to support its conclusion on the merits, and the plaintiff-individuals are not aware of any authority indicating that "to a legal certainty" their federal claims must fail. Rather, from the above authorities, the plaintiff-individuals' federal claim appears quite substantial. The trial court erred in prematurely attempting to rule upon the merits of the claim. The federal court has jurisdiction of that

federal claim and, additionally, pendent jurisdiction over all other claims arising in the same transactions. See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE §3567 (1975).

The trial court had jurisdiction for this additional reason and, even if diversity jurisdiction were lacking, the case should be remanded to the trial court for trial, or at least to the Court of Appeals for review of the federal question jurisdictional issue.

CONCLUSION

The eight plaintiff-individuals pray that the Court affirm the judgment of the Court of Appeals and remand the case to the trial court or, at least, remand the case to the Court of Appeals for determination of issues it did not decide.

Respectfully submitted,

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